the benefit or services receives federal financial assistance." *Patrick*, 2010 WL 4879161, at *2 (citing *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002)). USPO conducts activities that receive federal financial assistance because it is part of the Administrative Office (AO) of the federal court system, which is funded by congressional appropriations. *E.g.*, Consolidated Appropriations Act, 2023, div. E, tit. III, Pub. Law 117-328, 136 Stat. 4459, 4670 (2022).

However, the RA may not apply to USPO because of its position in the federal judiciary. USPO is a part of the federal judiciary. 18 U.S.C. § 3602 (2018). One district court held in an unpublished opinion that the Rehabilitation Act did not create a cause of action for monetary damages for failure to accommodate. *Patrick*, 2010 WL 4879161, at *2. At least one Circuit claims on its website that the Rehabilitation Act does not apply to the federal courts. *Disability Access*, Fed. Ct. App. for Tenth Cir., https://www.ca10.uscourts.gov/clerk/disability-access. The RA specifies that the "head of [a covered] agency" must make rules to carry out the Act. 29 U.S.C. § 794 (2018). Similarly, Section 508, which lays out website accessibility requirements, applies to "federal departments and agencies." 29 U.S.C. § 798 (2018). This language weighs against applying the RA to the federal judiciary because the judiciary is not a department or agency. By contrast, another statute requiring interpreter access in federal courts specifies that the law applies to "the United States Courts." 28 U.S.C. § 1827 (2018). The RA has been specifically held not to apply to the Transportation Security Administration (TSA) where TSA's authorizing statute limited the applicability of other statutes. *Joren v. Napolitano*, 533 F.3d 1144, 1144 (7th Cir. 2011). Like the statute at issue in *Joren*, Article III limits Congress's power over the judiciary. U.S. Const. Art. III § 2. The language in the RA and the recognized limits of the Act indicate that the Act may not apply to USPO.

2. Federal judicial policy requires USPO to accommodate Mr. [redacted]'s communication disability. Mr. [redacted] can request certain accommodations even if the Rehabilitation Act does not apply because his symptoms constitute a communication disorder.

Even if the RA does not apply, and even though the ADA does not apply, USPO must accommodate people with disabilities according to the federal courts' longstanding policy. The federal courts have had a policy of making accommodations for people with disabilities for more than two decades. *Report of the Proceedings of the Federal Judicial Conference of the United States*, Judicial Conf. 75 (Sept. 19, 1995), https://www.uscourts.gov/file/1995-09pdf. Federal judicial policy focuses on individuals with "communications" disabilities like deafness. *Id.* At least one Circuit reads the policy as requiring the federal courts to provide "reasonable accommodations to persons with disabilities, including communications disabilities" even though the ADA does not apply. *ADA Accommodations*, Fed. Ct. App. for Eighth Cir., https://www.ca8.uscourts.gov/ada-accommodations. In an unreported case, a district court explained that the federal courts have "long supported full access to judicial proceedings by *all segments* of the disabled community." *Patrick*, 2010 WL 4879161, at *4 (emphasis added). The phrasing in these two sources indicates a broader focus. USPO must provide reasonable accommodations to people with communication disabilities and may also be required to accommodate individuals with psychiatric disabilities other than communication disabilities.

Even if the RA does not apply to USPO, and even if federal court policy only requires accommodating communication disabilities, Mr. [redacted] could still request accommodations because his psychiatric disabilities manifest as communication disorders.

A communication disability, also called a communication disorder, includes "central auditory processing disorders," which affect an individual's "conscious and unconscious" ability to "filter, sort, and combine information." Ad Hoc Comm. on Serv. Delivery in Schs., *Definitions of Communication Disorders and Variations*, Am. Speech-Language-Hearing Assoc. (1993), https://www.asha.org/policy/rp1993-00208/. In Mr. [redacted]'s case, his communication disorder is "secondary to other disabilities." *Id.* Mr. [redacted]'s PTSD symptoms, including his avoidance of stimuli that remind him of his traumatic experiences, limit Mr. [redacted]'s ability to process auditory stimuli. *PTSD Checklist* 1. This is especially true in the court and supervision contexts. Mr. [redacted]'s childhood trauma occurred in systems connected to the criminal legal system because of his mother's incarceration and his institutionalization.

Seeking accommodations for Mr. [redacted]'s secondary communication disorders would limit the types of accommodations he could seek because not all of Mr. [redacted]'s symptoms are reasonably related to communication. Requests for reasonable accommodations within this framework could include providing advance warning about visits and calls from his parole officer to allow Mr. [redacted] to prepare for a conversation that can trigger auditory processing difficulties because of the officer's association with Mr. [redacted]'s childhood trauma. *See infra* Sections 3.b. & c.

3. Mr. [redacted] could request accommodations for his disability under the Rehabilitation Act or federal judicial policy, including reducing required work hours, scheduled communications, and alternative check-in methods.

If USPO is subject to the RA, Mr. [redacted] can request and USPO must make modifications to allow Mr. [redacted] to participate in federal supervision unless the modifications would be an "undue hardship" or a "fundamental alteration." *Henrietta D.*, 331 F.3d at 272.

The undue hardship inquiry focuses on financial and administrative burdens. *See Olmstead v. L.C.*, 527 U.S. 581, 606 (1999). It takes a number of factors into account, including the size and budget of the program or entity. *Id.* USPO is part of the Administrative Office (AO) of the federal judiciary, which had a budget of $102,673,000 in Fiscal Year 2023. Consolidated Appropriations Act, 2023, div. E, tit. III, Pub. Law 117-328, 136 Stat. 4459, 4670 (2022). The federal judiciary also receives funding from fees. Admin. Off., *The Judiciary Fiscal Year 2024 Congressional Budget Summary* 40 (Mar. 2023), U.S. Cts., https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/congressional-budget-request. AO employs 28,223 court staff. *Id.* at § 8.1. More than 55,000 people are under federal supervision. *Id.* at 39.

A modification is a "fundamental alteration" to the "nature" of the activity if it changes an "essential aspect" or is "itself inconsistent with the fundamental character" of the activity. *PGA Tour v. Martin*, 532 U.S. 661, 683 (2001). The purpose of federal supervision is to "facilitate a 'transition[] to community life.'" *Mont v. United States*, 139 S. Ct. 1826, 1833 (2019) (quoting *United States v. Johnson*, 529 U.S. 53, 56 (2000)). USPO uses a variety of methods. A "fundamental alteration" would therefore need to either be or be inconsistent with the goal of a successful transition.

a. Reducing the work-hours requirement would be a reasonable accommodation for Mr. [redacted]*'s PTSD.*

Mr. [redacted] could request that the court remove the requirement that Mr. [redacted] work a set number of hours. Alternatively, he could request that the court reduce the number of hours he must work.

Reducing or removing the work-hours requirement is necessary to avoid discriminating against Mr. [redacted] because of his PTSD. Mr. [redacted]'s psychiatric disability causes him to

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be alert at all times, causing fatigue. *PTSD Checklist* 1; MJA Letter. Working 40 hours per week is therefore more onerous for Mr. [redacted] than it would be for an individual without a disability. Mr. [redacted] requires schedule modifications to work in the afternoon and evening. MJA Letter.

Reducing or removing the work-hours requirement is a reasonable request because it would neither cause undue hardship to USPO nor fundamentally alter the activities of supervised release.

Changes to the work-hours requirement would not be an "undue hardship" on USPO. Reducing the number of hours Mr. [redacted] must work would require no more resources than the current requirement. Removing the work-hours requirement would decrease the resources USPO must expend to supervise Mr. [redacted] because the PO would have one fewer activity to monitor. USPO is a large organization with a large budget, so even if removing the hours would require USPO to expend more resources to monitor another transition metric, it is unlikely that USPO could prove that this rises to the level of "undue hardship."

Neither a modification to nor the removal of the work requirement would be a fundamental alteration to the nature of supervised release. Reducing the number of required hours (while still requiring that Mr. [redacted] be employed or studying) would accomplish the same goals as the standard condition. Reducing the required hours would give Mr. [redacted] a better chance of successfully transitioning into "community life" because he would have more energy to spend time with his family and community. Removing the requirement entirely also does not fundamentally alter supervision because USPO and the courts can still require Mr. [redacted] to show that he is engaging in other activities that facilitate his transition into community life and must still require Mr. [redacted] not to violate the law.

Mr. [redacted] could prevail on a claim that USPO failed to accommodate him if they refuse to modify the work-hours requirement. Although a previous challenge to a work-hours requirement in the Second Circuit failed, Mr. [redacted]'s circumstances differ in significant ways. In *United States v. Buchanon*, the court held that requiring a defendant to work 40 hours per week did not violate the defendant's rights because the court considered "the defendant's history and characteristics" and did "not involve any greater deprivation of liberty than is reasonably necessary." 813 F. App'x 683, 686 (2d Cir. 2020) (citing U.S.S.G. § 5D1.3(b)(1); 18 U.S.C. § 3583(d)(2) (2018)). Unlike the requestor in *Buchanan*, Mr. [redacted] has "characteristics" that make a 40-hour-per-week schedule untenable. Mr. [redacted]'s request for changes to the work-hours condition is a reasonable request under the RA.

b. Scheduled communication would be a reasonable accommodation for Mr. [redacted]'s PTSD.

USPO's communications with Mr. [redacted] can trigger psychiatric consequences because of Mr. [redacted]'s traumatic experiences with the criminal-legal system, so USPO could be required to change the ways its agents communicate with him to facilitate Mr. [redacted]'s full participation in supervised release.

Scheduled contact with USPO's agents would be a reasonable modification. PTSD can cause hypervigilance, being easily startled, and intense emotional reactions to unexpected stimuli, especially stimuli that remind the person of a stressful experience. *PTSD Checklist* 1. One of Mr. [redacted]'s symptoms is avoidance of people and situations that remind him of stressful experiences. *Id.* His avoidance of USPO, including not reporting as required, is therefore a symptom of PTSD rather than an indication of noncompliance. Issuing a violation for not contacting USPO would prevent Mr. [redacted] from accessing supervised release because of his psychiatric disability. Scheduling visits and other contact would allow Mr. [redacted] to participate fully in the activities of supervised release.

Requiring USPO to schedule visits rather than calling, visiting Mr. [redacted]'s home, and searching Mr. [redacted]'s person and belongings without warning would not be an undue hardship, nor would it be a fundamental alteration. Scheduling visits would not necessarily require more USPO resources than unannounced visits. "Undue hardship" is a high bar and a fact-intensive determination. *Olmstead*, 527 U.S. at 606. The limited administrative resources associated with scheduling are unlikely to meet the "undue hardship" standard. Neither would scheduling visits limit the standard for "fundamental alteration," which requires that a modification change an "essential" aspect of the activity. *PGA Tour*, 532 U.S. at 683. Unannounced visits are a means towards the end of supervising a formerly incarcerated individual's transition out of prison. Scheduling visits would enhance, not undermine, the purpose of supervised release because it would enable Mr. [redacted] to prepare for conversations with USPO. This would allow him to speak more openly and collaborate more effectively with USPO.

The requirement to schedule contact should apply to USPO's communications with Mr. [redacted], not Mr. [redacted]'s appointments with USPO. Mr. [redacted] may miss scheduled appointments with USPO because of his psychiatric disabilities. USPO should not accompany this modification with inflexibility about missing or being late for scheduled appointments because the purpose of disability-rights statutes and policies is to protect disabled people like Mr. [redacted], not service providers like USPO.

c. USPO and its agents should provide alternative methods for checking in to facilitate Mr. [redacted]'s participation in supervision.

In addition to scheduling check-ins, Mr. [redacted] can request that USPO allow him to check in via text, through a third party, through voicemail, or using another method in his preferred setting. USPO blocks Mr. [redacted]'s access to supervised release because of his disability when it limits his abilities to check in. The conditions of Mr. [redacted]'s supervised release require Mr. [redacted] to check in as the PO instructs. Alternative check-in methods could mitigate the aspects of the check-in process that trigger psychiatric symptoms.

Mr. [redacted]'s PTSD causes him to feel isolated from other people and avoid stimuli that remind him of stressful experiences. *PTSD Checklist.* Contact with USPO likely reminds Mr. [redacted] of stressful experiences in his childhood. Mr. [redacted] needs flexibility in check-in methods to participate in supervision. *C.f.* MJA Letter.

For example, Mr. [redacted] recently missed an appointment with his court-ordered therapist in violation of his conditions of supervised release because the therapist refused to meet with him via his attorney's phone in the car. In this circumstance, Mr. [redacted] overcame symptoms of PTSD to establish an interpersonal connection with his attorney. Nonetheless, he was denied access to mental health services because of his disability. Allowing Mr. [redacted] to attend court-ordered appointments and check in with USPO via Mr. [redacted]'s preferred method and in Mr. [redacted]'s preferred setting would enable him to access supervision services.

Allowing flexibility in contact methods would not be an "undue hardship" because it would require no extra time or resources for USPO to accept a call from an alternative phone number or location. It would not be a "fundamental alteration" because the essential purpose of supervised release is to support Mr. [redacted]'s transition out of prison, not to encourage Mr. [redacted] to attend appointments in a certain way. Conducting appointments through alternative means would further the goal of supporting Mr. [redacted]'s transition because it would allow Mr. [redacted] to feel safer engaging with USPO's agents.

d. USPO will almost certainly not modify Mr. [redacted]'s conditions to allow him to use marijuana.

Although Mr. [redacted] has previously benefited from marijuana use to treat his psychiatric disability, he cannot successfully request a modification to his conditions of supervised release to allow him to use marijuana. A recent district court case in Connecticut denied a defendant's motion to modify his conditions so that he could use medical marijuana to treat his PTSD in an analogous context because "courts must impose the condition that the Defendant not violate federal law, and since possession of marijuana is illegal under federal law." *United States v. Blanding*, No. 3:21-CR-00156, 2022 WL 92593, at *3 (D. Conn. Jan. 6, 2022). This result is common to many federal courts. *See id.* (citing cases). Analyzed under the RA, modifying a standard condition could be a "fundamental alteration" and therefore unreasonable. If Mr. [redacted] requested that the court modify his conditions to allow him to use marijuana, the request would almost certainly be denied.

Applicant Details

First Name	**Isabella**
Middle Initial	**M.**
Last Name	**Lee**
Citizenship Status	**U. S. Citizen**
Email Address	**leei2024@lawnet.ucla.edu**
Address	**Address** Street **1951 Selby Ave Apt. 5** City **Los Angeles** State/Territory **California** Zip **90025** Country **United States**
Contact Phone Number	**702-521-1147**

Applicant Education

BA/BS From	**Bard College**
Date of BA/BS	**May 2017**
JD/LLB From	**University of California at Los Angeles (UCLA) Law School** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=90503&yr=2011**
Date of JD/LLB	**May 1, 2024**
Class Rank	**15%**
Law Review/ Journal	**Yes**
Journal(s)	**UCLA Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Skye Donald Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Stone, Rebecca
rebecca.stone@law.ucla.edu
(310) 794-9530
Franklin, Cary
franklin@law.ucla.edu
Cummings, Scott
Cummings@law.ucla.edu
(310) 794-5495

This applicant has certified that all data entered in this profile and any application documents are true and correct.

ISABELLA MELINDA LEE
702-521-1147 | Leei2024@lawnet.ucla.edu |1951 Selby Avenue, Apt. 5, Los Angeles, CA 90025

June 11, 2023

The Honorable Juan R. Sanchez
United States District Court
for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Re: Judicial Clerkship Application

Dear Chief Judge Sanchez:

I am a rising third-year law student at UCLA School of Law, specializing in Critical Race Studies and Public Interest Law and Policy. I am writing to express my interest in a judicial clerkship with your chambers beginning in September 2024. I am inspired by your background in public interest work, from your work at Legal Aid to your extensive experience as a public defender, and your commitment to ensuring equal access to the justice system. For example, I admire your efforts to increase awareness about the importance of juries that are as diverse as the communities they represent. My demonstrated commitment to public interest work makes me an excellent fit for your chambers. I believe that your mentorship combined with the opportunity to work on a wide range of civil and criminal matters, especially trials, would greatly support my aspiration to become a civil rights litigator. In addition, one of my closest friends lives in Philadelphia, and my partner's family lives in New Jersey, so I would be thrilled by the opportunity to begin my legal career there.

Prior to law school, I worked for several years as a law clerk and senior paralegal for solo practitioners who specialize in civil rights and employment litigation. I had significant responsibility in assisting with discovery to motion practice to trial, and gained substantial experience conducting legal research, analyzing complex legal issues, and drafting briefs. I continued to strengthen my research, writing, and analytical skills as a law clerk for the Legal Unit of the EEOC. Also, at UNITE HERE Local 11, I researched and wrote memoranda relating to contract and labor law issues, and interviewed workers to draft complaints on their behalf. This summer, I continue to hone my skillset as an Employee Justice Fellow at Allred, Maroko & Goldberg.

Additionally, my academic experience has prepared me to be an effective law clerk. In my Reproductive Rights seminar, I wrote a student comment asserting a constitutional basis for reproductive freedom under the Thirteenth Amendment. As a Senior Editor for the *UCLA Law Review*, I critique high-level legal scholarship and work closely with scholars to substantively edit their articles in preparation for publication. In a seminar on public interest legal practice, I worked with the ACLU of Southern California to draft a mediation brief in litigation against the City of Lancaster for violating the constitutional rights of unhoused people. I also gained leadership experience by founding the UCLA chapter of the People's Parity Project and serving as a Co-Chair for the El Centro Labor and Economic Justice Clinic. In both roles, I managed student volunteers in their pro-bono service, including developing a report on the professional diversity of state court judges in California, and supporting criminal record expungement for low-income community members. These roles have allowed me to make a difference in my community, while enhancing my interpersonal, communication, and organizational skills. As a result, I was one of the top ten pro-bono contributors in my class for the 2022-2023 academic year.

In sum, I believe I would be an asset to your chambers. Enclosed please find a copy of my resume, transcript, writing sample, and letters of recommendation from Professors Rebecca Stone, Cary Franklin, and Scott Cummings. Thank you for your consideration. I look forward to hearing from you.

Respectfully,
Isabella Lee

ISABELLA MELINDA LEE

702-521-1147 | Leei2024@lawnet.ucla.edu |1951 Selby Avenue, Apt. 5, Los Angeles, CA 90025

EDUCATION

UCLA School of Law | Los Angeles, CA
Juris Doctor expected May 2024 | GPA: 3.86 (Top 15%)
Honors: Masin Family Academic Excellence Silver Award – Labor Law & Collective Action
Specializations: David J. Epstein Program in Public Interest Law and Policy | Critical Race Studies
Activities: UCLA Law Review, Volume 71, *Senior Editor* | El Centro Labor and Economic Justice Clinic, *Co-Chair*
Skye Donald Moot Court, *Top 25% Competitor* | People's Parity Project at UCLA*, Founder and President*

Bard College | Annandale-on-Hudson, NY
Bachelor of Arts in Politics and Ethics, May 2017 | GPA: 3.61
Honors: Civic Engagement Student Fellow Award (Spring 2016)
Study Abroad: Bard College Berlin, Berlin, Germany, January 2015 – May 2017
Activities: Bard College Berlin, *Writing Center Tutor* (selected through professor nomination)
Internships: Staley B. Keith Social Justice Center, *Education, Research, and Non-Profit Development Intern*

EXPERIENCE

Allred, Maroko & Goldberg | Los Angeles, CA
CELA/FAIR Employee Justice Summer Clerkship Fellow May 2023 – Present

People's Parity Project | Remote
Leadership Fellow August 2022 – Present
Participate in organizing, movement building, and legislative advocacy trainings. Conduct research on professional diversity of California state court judges and draft and publish report with recommendations for the Governor and Judicial Nomination Commission. Advocate for legislation expanding workers' rights in California.

UNITE HERE Local 11 (Legal Department) | Los Angeles, CA
Workers' Rights Legal Extern August 2022 – December 2022
Conducted legal research and drafted memoranda on labor law and wage and hour issues. Investigated and drafted NLRB administrative charges. Assisted in preparation for interest and grievance arbitrations. Interviewed workers on workplace conditions and drafted complaints on their behalf. Took detailed notes in bargaining sessions.

U.S. Equal Employment Opportunity Commission (Legal Unit) | Los Angeles, CA
Law Clerk Summer 2022
Supported trial attorneys in class action litigation against employers for violations of Title VII, the ADEA and the ADA. Edited and cite checked legal briefs. Conducted legal research and drafted memoranda evaluating the strength of claims, discovery and motion practice. Reviewed discovery responses and tagged documents through Relativity.

The Clancy Law Firm, P.C. | New York, NY
Senior Paralegal and Law Clerk May 2019 – August 2021
Conducted legal research and drafted motions, briefs, pleadings, discovery demands and responses, subpoenas, correspondence with opposing counsel and judges, and jury instructions for employment law, civil rights, and personal injury law. Investigated cases, interviewed clients and witnesses, and drafted demand letters and complaints.

Legal Offices of James J. Lee / Rizio Lipinsky Law Firm | Las Vegas, NV / Santa Ana, CA
Senior Litigation Paralegal and Law Clerk September 2018 – August 2021
Managed law firm administration and trained and supervised staff. Conducted legal research and drafted motions, briefs, pleadings, discovery demands and responses, subpoenas, memoranda, case timelines, and deposition summaries. Assisted in trial preparation including fact investigation, preparation of timelines, developing legal strategy, and interviewing witnesses.

Hudson/Catskill Housing Coalition | Hudson and Catskill, NY
Managing Grant Writer and Tenant Rights Coordinator June 2019 – July 2021
Created and managed volunteer-run Tenant Rights Hotline providing advice to tenants. Managed submission of grants applications. Successfully generated over $500,000 in funding. Worked with Board to develop programs including staffing and budgets. Researched housing law and policy and wrote informational pamphlets.

PUBLICATIONS

Isabella Lee, *San Diego, San Diego*, *in* HIC ROSA COLLECTIVE, FALSEWORK, SMALL TALK: POLITICAL EDUCATION, AESTHETICS, ARCHIVES AND RECITATIONS OF A FUTURE IN COMMON 317 (Colin Eubank & Asma Abbas eds., 2021)

LANGUAGE, SKILLS & INTERESTS

Conversational in German; Proficient in CaseMap and Relativity; Enjoy yoga, travel, creative writing, and cooking.

University of California, Los Angeles

LAW Student Copy Transcript Report

Student Information

Name:	LEE, ISABELLA M
UCLA ID:	405640053
Date of Birth:	09/16/XXXX
Version:	08/2014 | SAITONE
Generation Date:	June 08, 2023 | 09:59:49 PM This output is generated only once per hour. Any data changes from this time will be reflected in 1 hour.

Program of Study

Admit Date: 08/23/2021

SCHOOL OF LAW

Major:
LAW
Specializing in CRITICAL RACE STUDIES

Degrees | Certificates Awarded

None Awarded

Graduate Degree Progress

SAW COMPLETED IN LAW 612, 23S

Previous Degrees

None Reported

California Residence Status

Resident

Fall Semester 2021

Major:
LAW

CONTRACTS	LAW 100	4.0	14.8	A-
INTRO LEGL ANALYSIS	LAW 101	1.0	0.0	P
LAWYERING SKILLS Multiple Term - In Progress	LAW 108A	2.0	0.0	IP
PROPERTY	LAW 130	4.0	14.8	A-
CIVIL PROCEDURE	LAW 145	4.0	16.0	A

	Atm	Psd	Pts	GPA
Term Total	13.0	13.0	45.6	3.800

Spring Semester 2022

LGL RSRCH & WRITING End of Multiple Term Course	LAW 108B	5.0	18.5	A-
CRIMINAL LAW	LAW 120	4.0	13.2	B+
TORTS	LAW 140	4.0	14.8	A-
CONSTITUT LAW I	LAW 148	4.0	14.8	A-
EMPIRE & BORDERS	LAW 165	1.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	18.0	18.0	61.3	3.606

Fall Semester 2022

BUSINESS ASSOCIATNS	LAW 230	4.0	16.0	A
PROB SOLV PUB INT	LAW 541	3.0	12.0	A
PART-TIME EXTERNSHP	LAW 801	4.0	0.0	P
EXTN SEM: PUBLC INT	LAW 807	1.0	0.0	P

	Atm	Psd	Pts	GPA
Term Total	12.0	12.0	28.0	4.000

Spring Semester 2023

CIVIL RIGHTS	LAW 214	3.0	12.0	A
LABOR LAW	LAW 260	4.0	17.2	A+
LOCAL GOVT LAW	LAW 285	4.0	16.0	A
JOURNAL LEADERSHIP	LAW 347	1.0	0.0	P
REPRODUCIVE RIGHTS	LAW 612	3.0	12.9	A+

	Atm	Psd	Pts	GPA
Term Total	15.0	15.0	58.1	4.150

LAW Totals

	Atm	Psd	Pts	GPA
Pass/Unsatisfactory Total	8.0	8.0	N/a	N/a
Graded Total	50.0	50.0	N/a	N/a
Cumulative Total	58.0	58.0	193.0	3.860

Total Completed Units 58.0

Memorandum

RESIDENCE ESTABLISHED 8/10/2022
Masin Family Academic Silver Award
LABOR LAW, s. 1, 23S

END OF RECORD
NO ENTRIES BELOW THIS LINE

UCLA School of Law

REBECCA STONE
PROFESSOR OF LAW

SCHOOL OF LAW
BOX 951476
LOS ANGELES, CALIFORNIA 90095-1476
Phone: (310) 794-9530
Email: rebecca.stone@law.ucla.edu

May 19, 2023

Dear Judge:

I am writing to very strongly support Isabella Lee's application for a clerkship in your chambers. Isabella is a very smart, thoughtful and conscientious student with a strong sense of moral purpose and impressive strength of character. I believe that she will make an outstanding law clerk.

Isabella was in my torts class in Spring 2022. Although there were about 85 students in the class, I got to know Isabella well because she was an active participant during class discussions, and I met with her a few times outside class during and after the semester.

Isabella wrote an excellent exam receiving an A- grade. She did particularly well on the traditional "issue-spotter" component that consisted of questions about a fact pattern. Thus, her exam demonstrated a mastery of tort law doctrine and principles and an ability to skillfully apply it. Her performance throughout the semester was also excellent. She was always well-prepared when I called on her, and she was full of insightful questions and comments during class discussions. She has also done very well in her other law school classes, receiving nearly all A and A- grades to date.

Isabella has a strong interest in public interest work and a demonstrated commitment to social justice. She has worked as an organizer for the casino workers union in Las Vegas, where she grew up. She has taught at risk high school students about social justice. Before law school she spent time helping her father as he rebuilt his practice as a plaintiff's side solo practitioner, where among other things she worked on a case involving serious and systematic sexual harassment and discrimination of workers at TopGolf in Las Vegas. That experience taught Isabella a lot about the limits of private civil litigation and sparked her interest in impact litigation. Isabella provided know-your-rights trainings to tenants during the pandemic, and she was able to use the knowledge of tenants' rights that she gained by giving these trainings to help the plaintiffs in the TopGolf litigation fight their evictions.

Isabella has continued on this trajectory in law school. She has volunteered for the El Centro Labor and Economic Justice Clinic, which has given her insight into union contract negotiations and forms of worker organizing in pursuit of policy goals such as legislation to protect hotel housekeepers and taxation of hotels to build affordable housing. During the summer after her first year, she worked as a Leadership Fellow for the People's Parity Project creating a UCLA chapter, which has recruited nearly 80 student members. Last semester, the chapter hosted a panel with judicial candidates for LA County Superior Court who had professional backgrounds in public interest work and were running campaigns on the importance of professional diversity on the bench. She is now conducting a research project with the help of student volunteers, which analyzes the professional backgrounds of all California state court judges, revealing the overrepresentation of former prosecutors and corporate attorneys. She will publish a report using this data to urge the Governor and Judicial Nomination Commission in California to prioritize professional diversity in California state court appointments.

May 19, 2023
Page 2

In Fall 2022, Isabella worked as an extern with Unite Here Local 11, writing internal memoranda and administrative charges and position statements for Unfair Labor Practices charges before the NLRB. She is now a co-chair for the Labor and Economic Justice Clinic where she organized a labor and employment law panel and mixer last semester with local practitioners. She also runs the criminal record expungement clinic in partnership with Neighborhood Legal Services. This involves managing student volunteers as well as working directly with clients to prepare declarations and petitions for expungement on the clients' behalf.

On top of all of this, Isabella has competed in moot court, scoring in the top 25 percent. And she is now a Senior Editor of the UCLA Law Review where she works with authors to edit their articles for substance, style and organization.

I hope that it is clear from the above that Isabella is a very impressive person. As well as being academically talented, she is incredibly hardworking and in possession of a clear vision of what she wants to do with her law degree. She is someone who seizes every opportunity available to her to further her skills. I believe that she will make an outstanding lawyer. It is also noteworthy that during the semester when I taught her, Isabella was dealing with some very significant personal matters involving a member of her immediate family. While managing that she kept going with her classes and other commitments diligently, professionally and successfully—a testament to her great strength of character. Finally, Isabella is a tremendously nice person. It was a privilege to have her in my class and to have had the opportunity to get to know her. She will be a wonderful addition to your chambers should you choose to hire her.

Isabella has my highest recommendation. Please don't hesitate to get in touch with me if you have questions.

Sincerely,

R Stone

Rebecca Stone
Professor of Law

UCLA School of Law

CARY FRANKLIN
MC DONALD/WRIGHT CHAIR OF LAW
FACULTY DIRECTOR, WILLIAMS INSTITUTE
FACULTY DIRECTOR, CENTER ON REPRODUCTIVE HEALTH, LAW, AND POLICY

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May 12, 2023

Dear Judge,

I write to recommend Isabella Lee for a clerkship in your chambers. Isabella was a student in my Reproductive Rights and Justice seminar at UCLA Law School this semester (Spring 2023). To satisfy the requirements of this course, as well as UCLA's writing requirement, Isabella wrote a substantial research paper, which I supervised, pertaining to *Dobbs v. Jackson Women's Health Organization*, the 2022 U.S. Supreme Court decision that overturned *Roe v. Wade*. Talking with Isabella as she developed this project, I was very impressed by the depth of her knowledge, the creativity of her arguments, and the unusually mature and committed way in which she approached this work. She is an excellent researcher and an outstanding writer, and I am confident that she will be a first-rate law clerk.

Before I delve further into Isabella's research and writing skills, let me say a word about Isabella herself. UCLA Law School is full of thoughtful students, but Isabella stands out as one of the most thoughtful students I have encountered. My Reproductive Rights and Justice course is a seminar: the students engage in two hours of discussion each week on materials ranging from court decisions to law review articles to long-form journalism to newspaper articles. Within a few hours of meeting Isabella at the start of the semester, it became clear to me that she was able to analyze, contextualize, critique, and build out the arguments she encountered in those materials in an unusually impressive and intelligent way. In fact, on several occasions, her comments in class actually startled me; they were so insightful and original, and they made connections with so many ideas beyond the four corners of the texts we were reading, that I felt I was speaking with a colleague rather than a student. Soon, Isabella began staying after class to discuss the readings further and it quickly became apparent that she is, in fact, not an ordinary student. She has read widely in several fields and is able to apply theories and critical insights from these fields to legal issues in a way that is rare among law students, even at the very best law schools.

The fact that Isabella has read widely in several fields, and is conversant with legal, democratic, and feminist theory as well as political philosophy, enabled her to produce a more sophisticated paper than I usually see in my writing seminars (where the standard is generally quite high!). But I think what really set Isabella's paper apart from most I have read is that she *also* has an unusual degree of practical legal experience for a law student. Isabella worked as a paralegal for solo practitioners prior to arriving at law school, and those practitioners placed a great deal of trust in her: in the course of her work, she drafted summary judgment motions, engaged in in-depth fact investigations, and interacted extensively with clients. She has continued to gain practical experience at UCLA through her work with the People's Parity Project. This year, she has been part of a coalition doing legislative advocacy on behalf of a bill (AB 747) before the California legislature that would ban non-compete agreements in employment contracts and make clear that it is unethical for lawyers to put these provisions into contracts when they are unenforceable. All of this practical experience has given Isabella an unusually good sense of the kinds of legal arguments that can work in the world, not just in a law school paper, and it makes her writing particularly persuasive and compelling.

I will not rehearse the thesis of Isabella's paper at great length here but will just say a few words about it. Isabella's paper considers the potential relevance of the Thirteenth Amendment to modern-day questions regarding reproductive rights, and abortion rights in particular. The Thirteenth Amendment is receiving an increasing amount of attention these days, now that the U.S. Supreme Court has declared that the Fourteenth Amendment's due process provision does not protect the right to abortion. I was impressed by several aspects of Isabella's work on the Thirteenth Amendment. Her footnotes, and the sophistication of her analysis, reveal that she has read very deeply in the constitutional and political theory literature about the Thirteenth Amendment, as well as in Thirteenth Amendment case law. When I read her first draft, I had very little criticism of her handling of the literature and the cases; she really understood the different theories of the Amendment and how courts have interpreted the Amendment over time. She is also just an excellent writer. When the students presented and workshopped their papers in class, numerous of her classmates commented on the cogency and clarity of her writing, and they were right: her writing is outstanding. I think the thing that really stood out to me, however, was the novelty and the practicality of Isabella's work. Most people who make Thirteenth Amendment arguments for abortion rights these days argue that compelling people to be pregnant and to give birth against their will is a "badge or incident" of slavery. Isabella framed her arguments a bit differently, examining the ways the Thirteenth Amendment has been understood to apply to coerced labor outside of slavery contexts. She made a strong argument for incorporating Thirteenth Amendment cases involving indentured servitude and workers in the late nineteenth and early twentieth centuries who were effectively unfree to stop working into our understanding of the breadth and potential of the Amendment. Her paper also analyzes in a very thoughtful way the current prospects of these kinds of arguments in court, and their potentially greater prospects in the political realm. It's an excellent paper, and one of the best I have read in my twelve years as a professor.

In conclusion, I will just say that I also think very highly of Isabella Lee as a person. She has such a lively mind; she is curious and interested in legal theory while also being very practical and down-to-earth about law and doctrine. These qualities will make her a very formidable and effective lawyer. But I think her openness, friendliness, and generosity will be no less important as she enters the legal world. Isabella is genuinely interested in what other people think, and she treats everybody with respect. She is a leader, but she also works well with other people and as part of a team. I would be thrilled to have her as a co-clerk and I would be extremely happy to have her as a law clerk. She is diligent, reliable, and energetic. She will do the work and she will do it very well. I am so glad I had an opportunity to work with Isabella at UCLA Law, and I am excited to see where she goes from here. I recommend her wholeheartedly.

Sincerely,

Cary Franklin
McDonald/Wright Chair of Law
Faculty Director, The Williams Institute
Faculty Director, The Center on Reproductive Health, Law, and Policy
UCLA School of Law

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June 7, 2023

Re: Isabella Lee

Dear Judge:

I write to give my most enthusiastic recommendation in support of Isabella Lee's application to serve as a clerk in your chambers. She is one of my most fantastic and memorable students in 20 years at UCLA—someone with incredible values and work ethic, exquisite research and writing skills, a wise sense of judgment, and a passion for justice. I got to know Isabella very well last year as she was a student in my Business Associations (Fall) and Local Government Law (Spring) courses. She was easily one of the very top students—receiving an A in each course. This is consistent with her overall performance at the law school, where she has an outstanding GPA and extracurricular honors that reflect high intellectual attainment (including being selected as a senior editor of the UCLA Law Review and a top competitor in the moot court competition). I can attest from her performance in both of my courses—based on her final examinations—that her writing skills place her among the very top students at the law school and among the top 5% I have seen during my time here as a professor. I have no doubt that she would excel as a law clerk.

What makes Isabella truly special, in my view, is that she puts her sterling academic skill to work in the service of workers who are disadvantaged by the system. Isabella is a person who knows what she wants to do and makes it happen. She has a quiet confidence that reflects a sense of purpose. Her commitment to advancing the interests of disadvantaged groups is evident in her lengthy record of public service and support for workers' rights, which dates back to her high school days, when she interned at the UNITE HERE union organizing workers at casinos in her hometown of Las Vegas. This commitment has driven Isabella through law school, where she has won a number of prestigious positions in employment and labor organizations, including a summer internship at the LA branch of the EEOC, an externship at the famed UNITE HERE Local 11, and this summer working as a fellow at Gloria Allred's widely acclaimed employment law firm. This is simply a stunning record of achievement that illustrates Isabella's focused dedication to improving conditions for workers in Los Angeles and beyond.

As I mentioned, last year I had the privilege of having Isabella in two courses: one large lecture course, Business Associations, and one medium-sized course, Local Government Law. Across these different formats, Isabella stood out in class as an active and insightful student, always engaged and full of good questions after class and in office hours. While Isabella's performance in Business Associations caught my attention with her top exam score, I really got to know her in Local Government Law. That course regularly attracts between forty and fifty students who are motivated to understand how cities work in order to make an impact as lawyers at the local level. In our discussion of preemption, she went above and beyond to prepare and engage in discussion and was a catalyst for productive discussion. Isabella's commitment to workers' rights made her interested in understanding what cities could do to protect workers without running afoul of state and federal preemption. Because of her background in housing,

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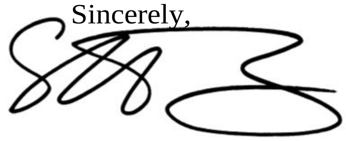
she was also quite knowledgeable about the housing crisis and tools to address affordability. In class, she often raised points on these and other issues demonstrating deep understanding of the materials and breadth of knowledge gained from her experience. She really showed her dedication by coming every week to office hours, working tirelessly to master the materials. As I said, she earned one of the highest marks in the course, which was based on her exam score in addition to participation in class, where she stood out as an insightful and respectful interlocutor. When she talked, I was always eager to listen because her contributions invariably moved the discussion to higher levels. Isabella doesn't dominate conversations; rather, she picks her spots. Her passion for economic and housing justice work shone through and elevated her performance to the upper echelon of the class.

I have also been impressed by the leadership roles Isabella has played on campus and beyond. She is a member of the Epstein Program in Public Interest Law and Policy and Critical Race Studies specializations, which are hyper-competitive to get into and prepare students for an impactful career in public service. I know this because I directed the Public Interest Program for several years and remain closely connected to it. Isabella is widely admired among her peers and her contributions to the small, elite community of public interest students has been noted to me by program staff and others in the program. On top of this, Isabella has played a leadership role in the student-run El Centro Labor and Economic Justice Clinic, further deepening her workers' rights credentials, while serving as a leadership fellow in the People's Parity Project, where she has advocated for the California State Bar to take a stronger role sanctioning lawyers who draft facially illegal contracts. As an ethics scholar, this is of great interest to me and I have talked to Isabella at length about her work on this project. As always, she had tremendous grasp of the facts and thoughtful insights about how to address the problem.

As all of this suggests, Isabella is ideally situated to make an enormous impact as a law clerk. She wants this experience to deepen her litigation skills to prepare her to make even more of an impact as a workers' rights lawyer. This clerkship would be a critical step on that path and I hope that you give her the strongest consideration. I truly believe that Isabella is a special person who has the complete package. She is incredibly smart, voraciously absorbs information, responds effectively to feedback, and cares deeply about law as a tool of justice. As I have stressed, her writing is excellent, as are her research skills. On top of this, she has outstanding inter-personal and leadership skills. And she is a kind person who cares about using law to help those around her. She has excelled academically and engaged in work in the private and public sectors that demonstrates her commitment to excellence and public service. She is truly outstanding and I recommend her to you with all of my enthusiasm.

Sincerely,



Scott L. Cummings
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WRITING SAMPLE

As a law clerk for the EEOC Legal Unit, I drafted the attached internal memorandum for my attorney supervisor. The memorandum examined whether the employer could have a viable "equal opportunity harasser" defense in the Ninth Circuit, based on the alleged discriminatory official's sexual harassment of both male and female employees.

This memorandum is self-edited and constitutes original work product. To preserve confidentiality, names of the parties and witnesses have been redacted or changed. I have received permission from the Commission to use this memorandum as a writing sample.

MEMORANDUM

To: Derek Li
From: Isabella Lee
Date: August 2, 2022
Re: Whether EMPLOYER Can Assert an Equal Opportunity Harasser Defense

I. Question Presented

Where a supervisor sexually harasses both men and women, does the equally abusive treatment of both genders preclude the conduct from being discrimination on the basis of sex? In other words, in the Ninth Circuit, can EMPLOYER escape Title VII liability by arguing that SUPERVISOR was a so-called "equal opportunity harasser," and therefore his sexual harassment is not sex discrimination because he targeted male and female employees indiscriminately?

II. Brief Answer

EMPLOYER likely cannot assert an equal opportunity harasser defense to escape liability under Title VII in the Ninth Circuit. While the equal opportunity harasser defense has been accepted in most circuits, the defense does not fare well in the Ninth Circuit. *See, e.g.*, *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004).

The equal opportunity harasser defense emerges from the evidentiary burden on a plaintiff asserting sexual harassment to demonstrate differential treatment of comparators of the opposite gender in order to establish the causal nexus between the harassment and the plaintiff's sex, [1] as required by Title VII. The defense asserts that if both men and women are sexually harassed, a plaintiff cannot show that the harassment was because of their sex (understood as binary) as either a male or female. *See, e.g.*, *Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000).

In Ninth Circuit cases where employers asserted an equal opportunity defense, courts have avoided the defense by finding that even where a sexual harasser targeted men and women equally, differences in the subjective impact of the harassment on women compared to men rendered the harassment sufficiently gender-specific to be "based on sex." *See, e.g.*, *EEOC v. Nat'l Educ. Ass'n, Alaska,* 422 F.33d 840, 845-46 (9th Cir. 2005). Under this framework, the EEOC could overcome EMPLOYER's assertion that SUPERVISOR was an equal opportunity harasser by pointing to disparities

[1] The concept of "sex" is not equivalent to the concept of "gender." *See, e.g.,* Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender,* 144 U. PA. L. REV 1 (1995). In this memo the terms "sex" and "gender" are used interchangeably to signify the legal categorization of people into the generally recognized binary classes of "men" and "women."

in the subjective impact of the harassment experienced by female versus male claimants. *Id.* However, taking this position could be problematic if it requires the EEOC to downplay the subjective harm SUPERVISOR's harassment caused men as compared to women, especially if SUPERVISOR's conduct harmed both male and female claimants with equal severity and in similar ways.

The EEOC can defeat the equal opportunity defense without differentiating the subjective impacts of SUPERVISOR's harassment on male versus female claimants by instead emphasizing the Ninth Circuit's rulings that harassment that is sexual in nature is per se "based on sex," and therefore a showing of differential treatment of comparators of the opposite gender is unnecessary. *See, e.g.*, *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1051, 1064 (9th Cir. 2002). This approach is strengthened by the Supreme Court's recent clarification that sex discrimination is not limited to the disparate treatment of men and women. *See Bostock v. Clayton County*, 140 S. Ct. 1731, 1741-42 (2020).

In sum, by focusing on the sexual nature of SUPERVISOR's conduct and the ways in which it targeted the claimants' bodies in a manner inherently linked to their sex, the EEOC can likely defeat any assertion of an equal opportunity harassment defense by EMPLOYER, without de-emphasizing the harmful subjective impact of the harassment on male compared to female claimants,

III. Statement of Facts

Respondent EMPLOYER employed the alleged discriminatory official SUPERVISOR (male) as its Chief Financial Officer. SUPERVISOR held supervisorial authority over Charging Parties Jane Doe ("Doe") (female), John Roe ("Roe") (male), and Larry Loe ("Loe") (male) (collectively "Claimants").

From Ms. Doe's date of hire in or about January of 2020 to her termination on October 5, 2020, SUPERVISOR sexually harassed Ms. Doe on a regular basis by, inter alia, sending sexual invitations through text, staring at her chest while saying, "I can't help myself," bumping into her in a sexual manner, and kissing her without consent.

From Mr. Roe's date of hire in or around October of 2019 to his termination on October 30, 2020, SUPERVISOR sexually harassed Mr. Roe on a regular basis by, inter alia, bringing a sex worker to work and encouraging him and other employees to use her services, commenting on Mr. Roe's appearance in a sexual manner, telling Mr. Roe, "what a nice set of balls you have there," suggesting that Mr. Roe was sleeping with his female co-workers, and hugging Mr. Roe from behind.

From Mr. Loe's date of hire in or about January of 2020 to his termination on October 12, 2020, SUPERVISOR sexually harassed Mr. Loe on a regular basis by, inter alia, staring at him while biting his tongue, licking his lips, and calling him "mi amor," gesturing towards Mr. Loe's genitals as if masturbating, groping him from behind while making sexual noises, grabbing Mr. Loe's genitals, and pushing his fingers into Mr. Loe's anus over his pants while saying "my love."

IV. Discussion

A. Courts that Require a Showing of Differential Treatment of Women Compared to Men to Establish Sex-Based Discrimination Recognize the Equal Opportunity Harasser Defense.

Section 703 of Title VII of the Civil Rights Act of 1964 prohibits employment practices that adversely affect an individual's status as an employee *because of* such individual's "race, color, religion, sex, or origin." 42 U.S.C. § 2000e-2(a). In 1980, the EEOC issued updated sex discrimination guidelines indicating without qualification that sexual harassment violated section 703 of Title VII. 29 C.F.R § 1604.11(a). In *Meritor Savings Bank v. Vinson*, the Supreme Court followed those guidelines and established hostile workplace sexual harassment as a cause of action under Title VII, emphasizing differential treatment of men and women, and stating that sexual harassment is "every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality." 477 U.S. 57 (1986).

Courts subsequently diverged over the meaning of conduct based on sex. Some held that sexual conduct at work can be actionable simply because it is sexual in nature (the "sex per se rule"),[2] even in the absence of evidence of the harasser's motivations in relation to the plaintiff's sex. *See, e.g., Doe v. Belleville*, 119 F.3d 563, 575-77 (7th Cir. 1997) ("Proof that the harasser was motivated to target (or in practice did target) one gender but not the other may be necessary where the harassment is not on its face sexual . . . but such proof would seem unnecessary where the harassment itself is imbued with sexual overtones.") *vacated,* 523 U.S. 1001 (1998), *abrogated by Oncale v. Sundowner Offshore Servs., Inc.*, 532 U.S. 75 (1998); *Nichols v. Frank,* 42 F.3d 503, 511 (9th Cir. 1994) ("[S]exual harassment is *ordinarily* based on sex. What else could it be based on?") *abrogated on other grounds by Hudson v. Tahoe Crystal Bay, Inc.*, 191 F.3d 460 (9th Cir. 1999). In contrast, the Supreme Court and other circuits

[2] *See* David Schwartz, *When is Sex Because of Sex? Causation Problems in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1700 (2002) (describing the rule of "sex per se": "whatever other conduct might constitute sexual harassment, and whatever other elements might be required to prove actionable sexual harassment, sexual conduct per se established the 'causation' element under Title VII to prove that the conduct was 'because of sex.'").

seemed to maintain that evidence of differential treatment of women versus men is required. *See, e.g., Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."); *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) ("In proving a claim for a hostile work environment due to sexual harassment. . . the plaintiff must show that, but for the fact of her sex, she would not have been the object of harassment.").

In other words, where courts require a showing of disparate treatment of men and women to establish that sexual harassment is "because of sex," they require the plaintiff to rely on group-comparators to prove causation. It is in this context that the loophole of the "equal opportunity harasser" has emerged.

B. The Majority of Circuits Adopt the Equal Opportunity Harasser Defense. The Ninth Circuit is an Exception.

Although a court might find that SUPERVISOR sexually harassed both male and female employees with equal severity, thus rendering SUPERVISOR an equal opportunity harasser, EMPLOYER would have difficulty asserting this defense given its status in the Ninth Circuit. A majority of circuits have accepted the equal opportunity defense, while others have remained undecided, with the Ninth Circuit being the single exception in explicitly rejecting the equal opportunity harasser defense as a bar to liability.[3] However, as described below, the Ninth Circuit's rejection is not entirely unequivocal. *See infra* pp. 6-8.

The equal opportunity harasser defense asserts that an employer cannot be liable under Title VII when it subjects male and female employees to sexual harassment. The argument is that when an individual sexually harasses men and women with equal force, the plaintiff cannot show that the harassment is "because of sex" by pointing to the differential treatment of comparators of the opposite gender. The Supreme Court inadvertently developed the defense by emphasizing a group-comparative evidentiary scheme—which relies on a binary conception of sex—as the critical framework in sexual

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[3] David R. Cleveland, *Discrimination Law's Dirty Secret: The Equal Opportunity Sexual Harasser Loophole*, 58 HOW. L.J. 5, 23 (2014) ("Most circuits accept the equal opportunity harasser doctrine as an unavoidable consequence of Title VII's discrimination-based-on-sex requirement. The Ninth Circuit, however, refuses to apply it. Still others remain on the fence, referencing the issue without addressing it or factually distinguishing conduct toward men and women, which avoids confronting the doctrinal loophole.") (citations omitted).

harassment cases. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). While recognizing that Title VII's prohibition of discrimination "because of sex" protects men as well as women and encompasses same-sex sexual harassment, the Supreme Court in *Oncale* stated, "the critical issue is . . . whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Id.* at 78, 80.

Notably, the plaintiff in *Oncale* suffered sexual humiliation, sexual assault, and threats of rape by his male supervisors while working in an all-male work force, and thus could not point to differential treatment of women to establish that the harassment he faced was based on his sex. *Id.* at 77. The *Oncale* Court rejected the argument that same-sex sexual harassment went beyond the anti-discrimination purview of Title VII but failed to address or resolve the paradox it created for the *Oncale* plaintiff in stressing the need for coworkers of the opposite gender to serve as comparators in order to demonstrate the causal nexus between sex discrimination and sexual harassment.

After *Oncale*, circuits began to recognize and articulate the equal opportunity sexual harasser loophole. The Seventh Circuit explicitly stated and applied the defense in *Holman v. Indiana*, which held the claims of male and female plaintiffs arising out of sexual harassment by the same supervisor were not legally sound because the harassment targeted both sexes equally:

> [B]ecause Title VII is premised on eliminating discrimination, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit. Title VII does not cover the 'equal opportunity' or 'bisexual' harasser, then, because such a person is not discriminating on the basis of sex. He is not treating one sex better (or worse) than the other; he is treating both sexes the same (albeit badly).

211 F.3d 399, 403 (7th Cir. 2000). In *Holman*, the Seventh Circuit ruled that *Oncale* required a showing of differential treatment to establish sexual harassment as discrimination, and in doing so rejected its own circuit authority predating *Oncale* which held that evidence of disparate treatment was not necessary where conduct was sexual in nature. *Id.* at 403-04 (overruling *Doe v. Belleville*, 119 F.3d 563, 575-77 (7th Cir. 1997)). The equal opportunity harasser defense remains alive and well in the Seventh Circuit. *See, e.g.*, *Johnson v. Cmty. Integration Support Servs.*, No. 1:19-cv-04645-TAB-JRS, 2021 U.S. Dist. LEXIS 68384, at *8 (S.D. Ind. Apr. 8, 2021) (recognizing that conduct by an equal opportunity harasser is not actionable under Title VII).

The concept of the equal opportunity harasser has also been accepted by the Second, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits as an unavoidable consequence of Title VII's discrimination-based-on-sex requirement.[4] However, many courts avoid holding the defense is a bar to liability by finding that although there was harassment of both men and women, it was sufficiently gender-specific to constitute harassment based on sex. *See, e.g.*, *Petrosino v. Bell Atlantic*, 385 F.3d 210, 221-22 (2d Cir. 2004) (stating that although "a work environment which is equally harsh for both men and women cannot support a claim for sex discrimination[,]" the sexual environment in general was universally demeaning and exploitative to women only) (citations omitted); *see also Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811-12 (11th Cir. 2010) (holding "a substantial portion of the words and conduct alleged in this case may reasonably be read as gender-specific, derogatory, and humiliating" to women as a group).

C. While Ninth Circuit Authorities Generally Reject the Equal Opportunity Harasser Defense, it Remains a Viable Defense Where Harassed Employees Experience Equally Severe Subjective Harm, Regardless of Gender.

The Ninth Circuit has refused to apply the equal opportunity harasser defense.[5] In *Steiner v. Showboat Operating Co.*, the Ninth Circuit explicitly rejected the equal opportunity harasser defense in dicta. 25 F.3d 1459, 1463-64 (9th Cir. 1994). The Court could have avoided the defense without deciding whether the equal opportunity harasser argument was legitimate, because the harasser in *Steiner* did not *sexually* harass both men and women. *Id.* Although he consistently abused men and women, his abuse of women was sexual, with specific reference to women's bodies, while his abuse of men was merely hostile, consisting of referring to men as "assholes." *Id.* Nevertheless the Court in *Steiner* explicitly clarified that "even if [the harasser] used sexual epithets equal in intensity and in an equally degrading manner against male and female employees, he cannot thereby 'cure' his conduct toward women." *Id.* at 1464. The Court looked beyond the facts before it to state "although words from a man to a man are differently received from a man to a woman, we do not rule out the possibility that *both* men and women working [for the defendant] have viable claims against [the harasser] for sexual harassment." *Id.*

Cases citing *Steiner* have since elevated the dicta expressly rejecting the equal opportunity harasser to the law of the Ninth Circuit. *See, e.g.*, *EEOC v. Nat'l Educ. Ass'n, Alaska*, 422 F.33d 840, 845 (9th Cir. 2005) ("We have previously held that it is error to conclude that harassing conduct is not

[4] *Id.* at 23, n. 89.
[5] *Id.* at 39-40 (describing the Ninth Circuit as "the single circuit rejecting the equal opportunity defense").

because of sex merely because the abuser 'consistently abused men and women alike.'") (citing *Steiner*, 25 F.3d at 1463); *see also Swinton v. Potomac Corp.*, 270 F.3d 794, 807 (9th Cir. 2001) (plainly rejecting the defendant's claim of equal opportunity harassment and stating that the defense "provides no escape hatch for liability"); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103,1118 (9th Cir. 2004) ("Our case law is clear that the fact that an individual 'consistently abused men and women alike' provides no defense to an accusation of sexual harassment.") (citing *Steiner*, 25 F.3d at 1463).[6]

Yet, in *Nat'l Educ. Ass'n, Alaska*, the Ninth Circuit conceded that harassment of men and women must still target or affect one gender more than the other in order to be based on sex. 422 F.33d at 845-46. The Court found the character of the supervisor's aggressiveness different for men and women and held "evidence in subjective effects (along with, of course, evidence of differences in objective quality and quantity) is relevant to determining whether or not men and women were treated differently, even where the conduct is not facially sex—or gender—specific." *Id.* By continuing to rely on gender-specificity in the *impact* of harassment, the Ninth Circuit has not completely disposed of the conceptual foundation for the equal opportunity harasser: the evidentiary scheme that necessitates binary group-comparators to establish causation "based on sex." Accordingly, in a more recent decision, the Ninth Circuit pointed to differences in the subjective effect of the harassment on women compared to men to avoid the equal opportunity harasser defense. *Simmons v. Safeway*, *Inc.*, 820 Fed. Appx. 579, 581 (2020) ("The evidence here suggests that [the harasser's] staring affected women differently than it affected men: it made the plaintiff and at least one other female coworker very uncomfortable, whereas the male [employee] said he appreciated the staring.") (citing *Nat'l Educ. Ass'n, Alaska*, 422 F.33d at 845-46).

It is possible, if not probable, that an investigation of the subjective effects of SUPERVISOR's sexual harassment would reveal that it affected male and female claimants disparately due to differences in the way societally constructed gender norms determine how one experiences sexual abuse.[7] Thus, under existing Ninth Circuit case law, the defense would likely fail to protect EMPLOYER from liability so long as the EEOC could point to differences in how the female versus male claimants were

[6] Although both *Swinton* and *McGinest* are racial harassment cases, their holdings apply equally to sexual harassment hostile work environment claims. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536, U.S. 101, 116, n. 10 (2002) (holding that hostile work environment claims based on sexual harassment are reviewed under the same standard as those based on racial harassment).

[7] *See* Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 569 (2013) (noting how courts and even male rape victims struggle to accept when they have been victimized because "rape . . . only happens to women.").

subjectively impacted by SUPERVISOR's harassment. *See also Davis v. California Dept. of Corrections and Rehabilitation*, 484 Fed. Appx. 124, 128 (9th Cir. 2012) (holding the equal opportunity defense did not apply although both male and female workers were exposed to exhibitionist masturbation by inmates because "there is no evidence suggesting that they had similar subjective responses to that behavior.")

But avoiding the equal opportunity defense by pointing to differences in the subjective responses of male versus female claimants may require the EEOC to downplay the harm to male workers that resulted from SUPERVISOR's verbal and physical sexual harassment, and thereby further entrench societal assumptions that maintain men are not as seriously harmed or discriminated against by sexual harassment as women.[8] The Ninth Circuit has itself explicitly reiterated this assumption:

> [W]e believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. . . Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.

Ellison v. Brady, 924 F.2d 872, 878-79 (9th Cir. 1991).

In this case, the fact that Mr. Loe, a male worker, is the only known worker who SUPERVISOR is alleged to have raped in the workplace should cast doubt on the validity of the assumption that men are inherently less victimized by sexual harassment than women. Investigation of the subjective impacts of SUPERVISOR's conduct on Mr. Loe compared to the impacts on female claimants may very well reveal that Mr. Loe was equally, if not more, subjectively harmed by SUPERVISOR's sexual harassment.

In sum, while the Ninth Circuit has never accepted the equal opportunity harasser defense, it has also never established a complete rejection of the defense by disposing of the evidentiary need for group comparators to establish causation "based on sex" in sexual harassment cases. In a workplace like EMPLOYER's, where SUPERVISOR's sexual harassment may have harmed men and women equally, a court would have difficulty providing a reasoned rejection of the equal opportunity harasser defense by pointing to differences in the subjective impacts on male and female coworkers. However, an emphasis on the Ninth Circuit's "sex per-se rule" may provide the analysis needed to articulate a complete rejection of the equal opportunity harasser, especially after *Bostock v. Clayton County*, wherein the Supreme Court

[8] *See* Kimberly D. Bailey, *Male Same-Sex "Horseplay": the Epicenter of Sexual Harassment?*, 73 FLA. L. REV. 95, 100 (2001) (describing how courts perceived male on male sexual harassment as "personal" conduct between workers rather than statutorily-prohibited behavior).

rejected the equal opportunity harasser in dicta and clarified that establishing causation "based on sex" does not require pointing to comparators of the opposite gender. 140 S. Ct. 1731 (2020).

D. After *Bostock*, the Weight of Authorities Support a Complete Rejection of the Equal Opportunity Harasser Defense in the Ninth Circuit.

Although the Ninth Circuit cases cited above relied on gender-specific differences in the subjective impacts of sexual harassment to reject the equal opportunity harasser defense and establish the nexus between harassing conduct and sex discrimination, other Ninth Circuit case law holds that harassing conduct that is sexual in nature is per-se "based on sex." *See, e.g.*, *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1051 (9th Cir. 2002). In *Rene*, male coworkers physically and verbally sexually harassed the male plaintiff. *Id.* at 1064. The co-workers called the plaintiff "sweetheart" while forcefully caressing and hugging him and grabbing his crotch. *Id.* On one occasion, a male coworker poked his finger into the plaintiff's anus through his clothing. *Id.* The Ninth Circuit found that that physical sexual assault that targeted areas of the body linked to sexuality is "inescapably 'because of sex.'" *Id.* at 1066 (citing with approval to *Doe v. City of Belleville*, 119 F.3d 563 at 580 ("[W]e have difficulty imagining when harassment of this kind would *not* be, in some measure 'because of' the harassee's sex—when one's genitals are grabbed . . . it would seem to us impossible to delink the harassment from the gender of the individual harassed.")).

In direct opposition to the Seventh Circuit's ruling in *Holman* that *Oncale* established a requirement for comparators of the opposite gender, the Ninth Circuit explicitly rejected such an interpretation, and reasoned that the plaintiff in "*Oncale* did not need to show that he was treated worse than members of the opposite sex. It was enough to show that he suffered discrimination *in comparison to other men.*" *Id.* at 1067. This reading is consistent with the Ninth Circuit's definition of sexual harassment as verbal or physical conduct *of a sexual nature* that is unwelcome, severe or pervasive, and "both objectively and subjectively offensive" such that a "reasonable person" in the victim's position would find the conduct hostile. *EEOC v. Prospect Airport Services, Inc.*, 621 F.3d 991, 997 (9th Cir. 2010). With this framing, sexual harassment is not "based on sex" because it targets women more than men, or vice versa, sexual harassment is sex discrimination per se. *See Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994) ("sexual harassment is *ordinarily* based on sex. What else could it be based on?").

Just as the court in *Rene* found that the plaintiff was harassed 'because of sex' when a male coworker forced his finger in the plaintiff's anus through his clothing, a court should find that SUPERVISOR's verbal and physical harassment of male employees like Mr. Loe (which was strikingly similar to that of the *Rene* plaintiff) and female employees like Ms. Doe, was "based on sex" for both claimants, because it was blatantly sexual in nature. Focusing on the sexual nature of the harassing conduct to establish causation based on sex defeats the equal opportunity harasser defense because it does not require a showing of disparate treatment of men and women.

This sex per se framing of sexually harassing conduct as inherently based on sex is consistent with the Supreme Court's recent clarification on causation in sex discrimination cases in *Bostock*, which indicates a shift toward the sex per se rule illustrated in Ninth Circuit decisions like *Rene*. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). In *Bostock*, the Court held "Title VII liability is not limited to employers who, through the sum of all their employment actions, treat the class of men differently than the class of women." *Id.* at 1742. Rather, "the law makes each instance of discriminating against an individual because of that individual's sex an independent violation." *Id.* Through this reasoning, the *Bostock* Court specifically rejected the equal opportunity harasser defense, albeit in dicta: "[n]or is it a defense for an employer to say it discriminates against both men and women because of sex . . . instead of avoiding Title VII exposure, this employer doubles it." *Id.* at 1741.

A focus on the Ninth Circuit's definition of sexual harassment as sex discrimination *per se*, combined with *Bostock*'s rejection of the need for comparators of the opposite gender to establish sex discrimination, defeats the equal opportunity harasser defense conclusively.[9] Therefore, the fact that SUPERVISOR subjected male and female claimants to conduct that was blatantly sexual in nature and subjectively and objectively offensive to each of them does not protect EMPLOYER from liability. According to *Bostock*, SUPERVISOR's harassment of male and female workers does not preclude but rather "doubles" EMPLOYER's liability. *Id.* at 1741.

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[9] *See* Katherine Hanson, Comment, *Conduct, Causation, and Comparators: Revisiting the Defense of the Equal Opportunity Harasser After Bostock*, 73 LAB. L.J. 30-33 (2022) (discussing how *Bostock* seems to preclude the equal opportunity harasser defense by shifting to a sex per se theory of liability under Title VII, similar to the reasoning elaborated by the Ninth Circuit).

V. <u>Conclusion</u>

EMPLOYER will likely be unsuccessful in asserting that SUPERVISOR's conduct as an "equal opportunity harasser" is a defense to Title VII liability.

Applicant Details

First Name	**Jace**
Middle Initial	**J.**
Last Name	**Lee**
Citizenship Status	**U. S. Citizen**
Email Address	**jacelee@uchicago.edu**
Address	**Address** Street **235 E. 40th St.** City **New York** State/Territory **New York** Zip **10016** Country **United States**
Contact Phone Number	**2673037543**

Applicant Education

BA/BS From	**Swarthmore College**
Date of BA/BS	**June 2017**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 3, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Chicago Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Baird, Douglas
dbaird@uchicago.edu
Hafetz, Frederick
fhafetz@hafetzlaw.com
Hallett, Nicole
nhallett@uchicago.edu
773-702-9611

This applicant has certified that all data entered in this profile and any application documents are true and correct.

JACE JONGSEOK LEE
235 E. 40th St., Unit 21I, New York, NY 10016 • (267) 303-7543 • jacelee@uchicago.edu

June 9, 2023

The Honorable Juan R. Sanchez
U.S. District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, Pennsylvania 19106-1729

Dear Judge Sanchez:

I recently graduated from the University of Chicago Law School with Honors and am writing to apply for a clerkship in your chambers for the 2024–25 term. By 2024, I will have had 1 year of post-graduate work experience in litigation. I attended Swarthmore College in Philadelphia.

I will bring to your chambers strong skills in legal research and writing. In law school and during summer internships, I received highly favorable feedback on assignments with regard to refinement of legal standards and application of them to novel fact patterns. For example, as a student attorney in the Immigrants' Rights Clinic, I lead-drafted several briefs and received the highest grade in the Clinic. In addition to skills in analyzing and applying the law, I am an organized thinker and writer. At Swarthmore College, I first-authored a full research manuscript methodically synthesizing complex data and was one of few undergraduates to present at a national academic conference. I will use these skills to assist you effectively on various tasks, such as preparing bench memoranda and drafting opinions on dispositive motions.

Beyond abovementioned skills, as an aspiring trial lawyer, I would be honored to learn from someone like you, who has had an extensive and distinguished career as a litigator in both private and public settings. As a criminal defense paralegal for a former Chief of the Criminal Division at the U.S. Attorney's Office (SDNY), I helped prepare for trial a case involving a 45-count federal indictment. I analyzed voluminous discovery productions and prepared detailed fact memos of documents in relation to government charges. Moreover, in law school, I helped successfully defend a refugee from deportation by direct-examining a fact witness in immigration court. I hope to continue to develop a better understanding of trials.

Enclosed please find my resume, writing sample, and transcript for your review. Letters of recommendation from my former employer Fred Hafetz and Professors Nicole Hallett and Douglas Baird will arrive under separate cover. Thank you for your time and consideration.

Sincerely,

Jace J. Lee

Enclosures

JACE JONGSEOK LEE
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EDUCATION

THE UNIVERSITY OF CHICAGO LAW SCHOOL, Chicago, IL
J.D., *with Honors*, June 2023
Honors: *Law Review* (published member): Pro Bono Honors; Ellen S. & George A. Poole III Scholar
Publication: Jace Lee, *Applying the State-Created-Danger Doctrine to Cases Involving Suicide in Noncustodial Settings beyond Schools*, 5/23/2022 U. Chi. L. Rev. Online 1 (2022)
Activities: Immigrants' Rights Clinic; RA to Professor William Hubbard; Asian Pacific American Law Students Assoc.; First Generation Professionals; OutLaw; Education & Child Advocacy Society

SWARTHMORE COLLEGE, Swarthmore, PA
B.A., Educational Studies and Music, May 2017
Honors: *Phi Beta Kappa* (GPA: 3.93/4.00); Jacob & Rae Mattuck Scholar; Richard Rubin Scholar
Activities: Writing Program, Lead Fellow & Student Researcher; Student Academic Mentoring Program, Peer Mentor; Educational Psychology Lab, Research Assistant; Chamber Ensemble, Pianist

EXPERIENCE

IMMIGRANTS' RIGHTS CLINIC, **MANDEL LEGAL AID CLINIC**, Chicago, IL
Student Attorney, September 2021 – June 2023
- Lead-drafted and filed federal complaint alleging claims arising under FTCA and opposition to MTD
- Lead-drafted and filed briefs to Immigration Court re: Convention Against Torture; to Board of Immigration Appeals re: modified categorical approach involving Kentucky criminal statute and federal definition of crime of violence; to USCIS re: eligibility for asylum and humanitarian parole
- Direct-examined fact witness at immigration trial and successfully defended refugee from deportation

FOLEY HOAG, LLP, New York, NY
Summer Associate, May 2022 – July 2022 *** Offer to return extended and accepted ***
- Prepared memoranda re: excessive force doctrine under § 1983; re: prematurity of summary judgment; re: for cause limitation on credit bidding under 11 U.S.C. § 363(k); re: race-conscious admissions policy

U.S. ATTORNEY'S OFFICE, **EASTERN DISTRICT OF NEW YORK**, New York, NY
Summer Intern, *Civil Division*, June 2021 – August 2021
- Prepared memoranda re: "undue hardship" provision in 11 U.S.C. § 523(a)(8); re: effect of voluntary production of records on justiciability of FOIA action; re: viability of Title VII claim

HAFETZ & NECHELES, LLP, New York, NY
Paralegal, May 2019 – July 2020
- Prepared fact memoranda based on client meetings and teleconferences
- Analyzed voluminous discovery productions for federal criminal investigation
- Drafted cross-examination outlines of key government witnesses

THE NOCK LAB, HARVARD UNIVERSITY, Cambridge, MA
Research Assistant, October 2017 – April 2018
- Assisted research on suicidal behavior through collection and analysis of data

TEACH FOR AMERICA, Boston, MA
High School Teacher, June 2017 – October 2017
- Taught AP Calculus to 25 seniors and improved student performance on practice state exam by 40%

LANGUAGES & INTERESTS

- Fluent in Korean; conversational in Japanese; interested in piano composition and biking

THE UNIVERSITY OF CHICAGO

Name: **Jace Jongseok Lee**
Student ID: **12276137**

University of Chicago Law School

Degrees Awarded

Degree:	Doctor of Law
Confer Date:	06/03/2023
Degree GPA:	179.101
Degree Honors:	With Honors
	J.D. in Law

Academic Program History

Program: Law School
Start Quarter: Autumn 2020
Current Status: Completed Program
J.D. in Law

External Education

Swarthmore College
Swarthmore, Pennsylvania
Bachelor of Arts 2017

Beginning of Law School Record

Autumn 2020

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law Richard Mcadams	3	3	176
LAWS	30211	Civil Procedure William Hubbard	4	4	179
LAWS	30611	Torts Daniel Hemel	4	4	179
LAWS	30711	Legal Research and Writing Erin Lynn Miller	1	1	178

Winter 2021

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law John Rappaport	4	4	179
LAWS	30411	Property Lee Fennell	4	4	177
LAWS	30511	Contracts Bridget Fahey	4	4	178
LAWS	30711	Legal Research and Writing Erin Lynn Miller	1	1	178

Spring 2021

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Erin Lynn Miller	2	2	179
LAWS	30713	Transactional Lawyering Douglas Baird	3	3	177
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process Aziz Huq	3	3	178
LAWS	43201	Comparative Legal Institutions Thomas Ginsburg	3	3	176
LAWS	44201	Legislation and Statutory Interpretation Farah Peterson	3	3	177

Summer 2021

Honors/Awards
The University of Chicago Law Review, Staff Member 2021-22

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	40101	Constitutional Law I: Governmental Structure David A Strauss	3	3	176
LAWS	53264	Advanced Legal Research Todd Ito Scott Vanderlin	3	3	178
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	3	3	182
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	53306	Anthropology and Law	3	3	180
Req Designation:		Meets Writing Project Requirement Christopher Fennell			
LAWS	54303	Racism, Law, and Social Sciences Christopher Fennell	3	3	179
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	3	3	182
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Date Issued: 06/11/2023

THE UNIVERSITY OF CHICAGO

Name: Jace Jongseok Lee
Student ID: 12276137

University of Chicago Law School

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	43200	Immigration Law Amber Hallett	3	3	177
LAWS	43244	Patent Law Jonathan Masur	3	3	179
LAWS	81123	Negotiation Jesse Ruiz	3	3	181
LAWS	90211	Immigrants' Rights Clinic Amber Hallett	3	3	182
LAWS	94110	The University of Chicago Law Review	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

Summer 2022

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	42201	Secured Transactions Douglas Baird	3	3	180
LAWS	43284	Professional Responsibility and the Legal Profession Anna-Maria Marshall	3	3	182
LAWS	53459	Brief Writing and Appellate Advocacy Brett Legner	3	3	180
LAWS	93499	Independent Research: Federal Tort Claims Act (FTCA) Amber Hallett	2	2	183
LAWS	94110	The University of Chicago Law Review Anthony Casey	0	0	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	41101	Federal Courts Alison LaCroix	3	3	177
LAWS	46101	Administrative Law David A Strauss	3	3	180
LAWS	52003	Judicial Opinion Writing Robert Hochman Gary Feinerman	3	3	180
LAWS	93499	Independent Research: Federal Tort Claims Act (FTCA) Amber Hallett	1	1	183
LAWS	93499	Independent Research: Dilemmas of Legal Education Anna-Maria Marshall	2	2	183
LAWS	94110	The University of Chicago Law Review Anthony Casey	0	0	P

Spring 2023

Course		Description	Attempted	Earned	Grade
BUSN	42128	Outsourcing in the Modern Economy: Contract Governance and Business Strategy Lisa Bernstein	3	3	P
LAWS	41601	Evidence John Rappaport	3	3	181
LAWS	43208	Advanced Civil Procedure William Hubbard	3	3	177
LAWS	93499	Independent Research: Federal Tort Claims Act (FTCA)	1	1	183
Req Designation:		Meets Substantial Research Paper Requirement Amber Hallett			
LAWS	94110	The University of Chicago Law Review Anthony Casey	0	0	P

Honors/Awards
Pro Bono Honors

End of University of Chicago Law School

Date Issued: 06/11/2023

OFFICIAL ACADEMIC DOCUMENT

THE UNIVERSITY OF CHICAGO

Key to Transcripts of Academic Records

1. Accreditation: The University of Chicago is accredited by the Higher Learning Commission of the North Central Association of Colleges and Schools. For information regarding accreditation, approval or licensure from individual academic programs, visit http://csl.uchicago.edu/policies/disclosures.

2. Calendar & Status: The University calendar is on the quarter system. Full-time quarterly registration in the College is for three or four units and in the divisions and schools for three units. For exceptions, see 7 Doctoral Residence Status.

3. Course Information: Generally, courses numbered from 10000 to 29999 are courses designed to meet requirements for baccalaureate degrees. Courses with numbers beginning with 30000 and above meet requirements for higher degrees.

4. Credits: The Unit is the measure of credit at the University of Chicago. One full Unit (100) is equivalent to 3 1/3 semester hours or 5 quarter hours. Courses of greater or lesser value (150, 050) carry proportionately more or fewer semester or quarter hours of credit. See 8 for Law School measure of credit.

5. Grading Systems:

Quality Grades

Grade	College & Graduate	Business	Law
A+	4.0	4.33	
A	4.0	4.0	186-180
A-	3.7	3.67	
B+	3.3	3.33	
B	3.0	3.0	179-174
B-	2.7	2.67	
C+	2.3	2.33	
C	2.0	2.0	173-168
C-	1.7	1.67	
D+	1.3	1.33	
D	1	1	167-160
F	0	0	159-155

Non-Quality Grades

I	**Incomplete:** Not yet submitted all evidence for final grade. Where the mark I is changed to a quality grade, the change is reflected by a quality grade following the mark I, (e.g. IA or IB).
IP	**Pass** (non-Law): Mark of I changed to P (Pass). See 8 for Law IP notation.
NGR	**No Grade Reported:** No final grade submitted
P	**Pass:** Sufficient evidence to receive a passing grade. May be the only grade given in some courses.
Q	**Query:** No final grade submitted (College only)
R	**Registered:** Registered to audit the course
S	**Satisfactory**
U	**Unsatisfactory**
UW	**Unofficial Withdrawal**
W	**Withdrawal:** Does not affect GPA calculation
WP	**Withdrawal Passing:** Does not affect GPA calculation
WF	**Withdrawal Failing:** Does not affect GPA calculation
	Blank: If no grade is reported after a course, none was available at the time the transcript was prepared.

Examination Grades

H	Honors Quality
P*	High Pass
P	Pass

Grade Point Average: Cumulative G.P.A. is calculated by dividing total quality points earned by quality hours attempted. For details visit the Office of the University Registrar website: http://registrar.uchicago.edu.

6. Academic Status and Program of Study: The quarterly entries on students' records include academic statuses and programs of study. The Program of Study in which students are enrolled is listed along with the quarter they commenced enrollment at the beginning of the transcript or chronologically by quarter. The definition of academic statuses follows:

7. Doctoral Residence Status: Effective Summer 2016, the academic records of students in programs leading to the degree of Doctor of Philosophy reflect a single doctoral registration status referred to by the year of study (e.g. D01, D02, D03). Students entering a PhD program Summer 2016 or later will be subject to a University-wide 9-year limit on registration. Students who entered a PhD program prior to Summer 2016 will continue to be allowed to register for up to 12 years from matriculation.

Scholastic Residence: the first two years of study beyond the baccalaureate degree. (Revised Summer 2000 to include the first four years of doctoral study. Discontinued Summer 2016)

Research Residence: the third and fourth years of doctoral study beyond the baccalaureate degree. (Discontinued Summer 2000.)

Advanced Residence: the period of registration following completion of Scholastic and Research Residence until the Doctor of Philosophy is awarded. (Revised in Summer 2000 to be limited to 10 years following admission for the School of Social Service Administration doctoral program and 12 years following admission to all other doctoral programs. Discontinued Summer 2016.)

Active File Status: a student in Advanced Residence status who makes no use of University facilities other than the Library may be placed in an Active File with the University. (Discontinued Summer 2000.)

Doctoral Leave of Absence: the period during which a student suspends work toward the Ph.D. and expects to resume work following a maximum of one academic year.

Extended Residence: the period following the conclusion of Advanced Residence. (Discontinued Summer 2013.)

Doctoral students are considered full-time students except when enrolled in Active File or Extended Residence status, or when permitted to complete the Doctoral Residence requirement on a half-time basis.

Students whose doctoral research requires residence away from the University register *Pro Forma*. *Pro Forma* registration does not exempt a student from any other residence requirements but suspends the requirement for the period of the absence. Time enrolled Pro Forma does not extend the maximum year limit on registration.

8. Law School Transcript Key: The credit hour is the measure of credit at the Law School. University courses of 100 Units not taught through the Law School are comparable to 3 credit hours at the Law School, unless otherwise specified.

The frequency of honors in a typical graduating class:

Highest Honors (182+)
0.5%
High Honors (180.5+)(pre-2002 180+)
7.2%
Honors (179+)(pre-2002 178+)
22.7%

Pass/Fail and letter grades are awarded primarily for non-law courses. Non-law grades are not calculated into the law GPA.

P** indicates that a student has successfully completed the course but technical difficulties, not attributable to the student, interfered with the grading process.

IP (In Progress) indicates that a grade was not available at the time the transcript was printed.

* next to a course title indicates fulfillment of one of two substantial writing requirements. (Discontinued for Spring 2011 graduating class.)

See 5 for Law School grading system.

9. FERPA Re-Disclosure Notice: In accordance with U.S.C. 438(6)(4)(8)(The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

Office of the University Registrar
University of Chicago
1427 E. 60th Street
Chicago, IL 60637
773.702.7891

For an online version including updates to this information, visit the Office of the University Registrar website:
http://registrar.uchicago.edu.

Revised 09/2016

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THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL

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www.law.uchicago.edu

Douglas G. Baird
Harry A. Bigelow Distinguished Service Professor of Law

June 19, 2023

The Hon. Juan R. Sanchez
United States District Court for the Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez:

I write with great pleasure in support of Jace Lee's application for a clerkship in your chambers.

Mr. Lee has proved himself a most impressive young lawyer during his time at the University of Chicago Law School. He particularly stood out in the secured transactions class he took from me this past fall. He showed a natural aptitude for applying the principles embedded in a dense statutory framework to entirely novel transactions. On the examination, Mr. Lee was particularly impressive in the way he effortlessly dealt with the legal challenges raised by merchant cash advance funding transactions, a form of financing that is new on the scene and hardly touched upon in class. Both in class and especially outside of it, Mr. Lee was the one who asked hard questions that got exactly to the heart of the matter. Whenever he came by the office, it was always certain that his questions would be the hardest, the toughest, and the most interesting.

In manner and temperament, Mr. Lee exudes a quiet charm. He is serious and smart and emphatically a self-starter. The first in his family to attend college, Mr. Lee has forged his own way in the world, arriving on American soil at the age of twelve knowing little about this country, its language, and its customs beyond a rudimentary understanding of the English alphabet. Perhaps because of his fine musical ear, you would never guess that English was not his native language. His mastery of written prose is exemplary by any standard.

With his poise and ability to think on his feet, it is easy to see Mr. Lee as a litigator, and his intellectual gifts and inner drive will open any door for him in the law. There is no doubt but that he will be an outstanding law clerk, and I can recommend him enthusiastically and without reservation.

Sincerely,
Douglas G. Baird

OFFICES OF FREDERICK P. HAFETZ *LLC*
ATTORNEYS AT LAW

420 LEXINGTON AVENUE #2818
NEW YORK, N.Y. 10170
TELEPHONE: (2 I 2) 997-7400
TELECOPIER. (2 I 2) 997-7646

July 22, 2022

Re: Jace Lee Reference

To whom it may concern:

I write on behalf of Jace Lee who worked as a paralegal for my law firm from May 2019 to July 2020. I am a former Federal prosecutor. My law firm specializes in white collar criminal defense practice, and particularly in trial work.

I first describe the nature of the work that paralegals do for my firm. For many years, I have hired top college graduates as paralegals. Their work assignments involve the factual analysis of a case. In many ways, their assignments are like those of an associate in learning and analyzing the facts. I rely heavily on the memoranda that the paralegals prepare on the documents. I also have my paralegals participate in meetings with clients and witnesses and, importantly, in the internal office meetings as we develop case theory. I rely heavily on their work.

Jace is a standout among the many excellent paralegals I have hired over the years, many of whom who have gone on to become law clerks for federal judges. His primary assignment was working on preparation for trial of a 45-count federal indictment charging mail fraud, false statements and tax violations. The case ultimately went to trial after Jace had left my firm for law school. A substantial part of Jace's work was analysis of voluminous documents and preparation of memos about them. The documents included financial records and organizational records for a seven-year time period of a not-for-profit organization that my client headed. These documents were complex, and mastery of them was essential for the defense.

Jace's work on this was outstanding. His memos were some of the most comprehensive and insightful that paralegals have ever done for me. They were always extremely clearly written, concise and logical. And Jace would invariably find new issues that I had not thought of. And always, at our team meetings, Jace's insights were sharp and advanced our thinking on the case. His contribution to the case was invaluable. My greatest regret was that he was not in the court room to help us try the case.

Beyond this, he is a very nice person and easy to work with. His work ethic was admirable. He would often come in on weekends without being asked to do so because he felt that additional work was needed on one of his memos. Often on Mondays he would tell me about new problems that we needed to develop.

OFFICES OF FREDERICK P. HAFETZ *LLC*
ATTORNEYS AT LAW

420 LEXINGTON AVENUE #2818
NEW YORK, N.Y. 10170
TELEPHONE: (212) 997-7400
TELECOPIER. (212) 997-7646

I highly recommend Jace for a clerkship and would be pleased to discuss him with you.

Sincerely,

Frederick P. Hafetz

Frederick P. Hafetz

Nicole Hallett
Clinical Professor of Law
The University of Chicago
The Law School
1111 East 60th Street
Chicago, Illinois 60637
nhallett@uchicago.edu | 773.702.9611

June 09, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing this recommendation on behalf of Jace Lee for a clerkship in your chambers. I am a Clinical Professor of Law at the University of Chicago Law School and the Director of the Immigrants' Rights Clinic (IRC). Jace was a student in IRC from September 2021 to June 2022. IRC only enrolls 8-12 students per year and I work closely with each student on multiple projects. I have had over two dozen meetings with Jace, have reviewed at least a dozen drafts of legal documents, and had the opportunity to observe him in the classroom and in court. I can say unequivocally that he was the strongest student I taught last year in IRC and I believe he will make an excellent judicial clerk. You should hire him before someone else does.

Jace joined two teams and then volunteered for a third partway through the academic year. The first was a team representing a refugee from Syria on his application for asylum. The case required extensive fact development and legal research, both of which Jace excelled at. He also was the primary drafter of the legal brief that accompanied the application. Throughout the process, I noticed that Jace can focus on both the big picture and the tiniest of details. He works independently and handles deadlines well. More than that, he is a strategic and creative thinker who can put together complex ideas and arguments in a compelling way. Nothing could get by him. Jace noticed inconsistencies in the client's story that I did not even pick up on. He diligently researched filing requirements without me even asking him to do so. I knew that I could absolutely count on him to handle any job I gave him. I trusted him implicitly because the quality of his work was so consistently high. Jace was on a team with a third-year student who was much weaker than Jace. Jace not
only handled his tasks, but often redid tasks that the other student had completed.

Jace's second team represented an individual in removal proceedings and Jace was one of three students who were part of the trial team. Jace was responsible for doing the direct examination and defending the cross examination for two third-party witnesses. Though Jace joined the trial team just a few weeks before trial, he excelled at trial advocacy.

Though these skills may be less important for a judicial clerkship, they will no doubt serve him well in his future legal career, whatever path it takes. Again, as in the asylum case, Jace became proficient at any task given to him, putting in as many hours as possible to master it. It was not a surprise to me that we won the trial and that the judge specifically congratulated Jace on his performance.

If these two cases were not enough, Jace also volunteered halfway through the year for a third project applying for humanitarian parole for Afghans who remained in Afghanistan after the U.S. withdrawal. Jace understood the gravity of this project as well as that of the other projects to which he was assigned. In all three cases, people's lives were at stake. One mistake could lead to a person's death. Though I think this responsibility weighed heavily on Jace, he learned how to cope with it by investing even more time and energy in doing an excellent job. He earned the highest grade in clinic and several points higher than I would typically award. His work was of such high quality that I knew it needed to be reflected in his grade.

I have no concerns whatsoever about recommending Jace for a judicial clerkship. He would be an asset to you in every way—in writing bench memos and opinions, in providing support to chambers and the other law clerks, and in being a sounding board for ideas. Unfortunately, Jace has taken so many credits in my clinic that he cannot enroll again this year. I am actively finding ways to continue to work with him, through other classes or independent studies. There are few students who are as capable, intelligent, and hardworking as Jace. I hope you will consider hiring him to be your law clerk.

If you have any questions about this recommendation or Jace, please do not hesitate to contact me at 203-910-1980 or nhallett@uchicago.edu.

Sincerely,

Nicole Hallett
Clinical Professor of Law
University of Chicago Law School

NH/z

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Writing Sample

The following writing sample is part of a memorandum of law in opposition to the government's motion to dismiss in a currently pending case. Memo. Opp. Mot. to Dismiss, *Caal v. United States*, No. 23-cv-00598 (N.D. Ill. May 16, 2023). For this memorandum, I wrote the Argument section concerning the discretionary function exception under the Federal Tort Claims Act. 28 U.S.C. § 2680(a). The lawsuit asserts injuries arising from former President Trump's Zero Tolerance Policy, which forcibly separated thousands of immigrant families, including minors from their parents, as in this case.

I prepared this memorandum for the Immigrants' Rights Clinic at the University of Chicago Law School. I received minimal line edits from my supervising attorney. I obtained permission from the Clinic to use this memorandum as a writing sample.

INTRODUCTION

Plaintiffs Selvin Argueta Caal ("Selvin Sr.") and Selvin Aldair Argueta Najera ("Selvin Jr.") came to the United States to seek asylum. Instead, the father and son encountered a cruel and punishing federal policy of forced family separation. Now, Plaintiffs bring this lawsuit under the Federal Tort Claims Act ("FTCA") seeking redress for the trauma government officers inflicted on them. 28 U.S.C. §§ 1346(b)(1), 2671–2680. The government's motion to dismiss attempts to portray the zero-tolerance policy as routine enforcement of immigration law. It was not. In fact, the government essentially concedes that the policy and its applications were illegitimate, avowing that "[t]he United States does not defend the policy choices that led to family separations in the previous administration." Def.'s Memo. Supp. Mot. Dismiss 1, ECF No. 11.

Despite this admission, the government attempts to shield itself from accountability under a veil of sovereign immunity. But by enacting the FTCA, Congress waived the government's sovereign immunity for precisely the kind of tortious conduct Plaintiffs allege. In addition, Plaintiffs have sufficiently pled their claims. Accordingly, the Court should deny the motion to dismiss.

ARGUMENT

I. The Discretionary Function Exception Does Not Apply to Plaintiffs' Claims

The government cannot avoid liability by invoking the discretionary function exception ("DFE") of the FTCA. 28 U.S.C. § 2680(a) provides an exception to the FTCA's grant of jurisdiction for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." There are two steps to the DFE analysis. First, the action being challenged must be discretionary, "involv[ing] an element of judgment or choice." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). If the government fails the first step, the inquiry ends and the DFE does not apply. *Id.* Second, even if the challenged action involves an element of judgment or choice, the judgment or choice must be "of the kind that the [DFE] was designed to shield." *Id.* That is, the action must involve "permissible exercise of policy judgment." *United States v. Gaubert*, 499 U.S. 315, 326 (1991) (quoting *Berkovitz*, 486 U.S. at 538 n.3). The government fails both steps. Accordingly, this Court must reject the DFE defense.

A. The Challenged Actions Did Not Involve Any Element of Judgment or Choice

The actions of government officers that Plaintiffs challenge fall into two categories: the nearly two-year-long separation of Plaintiffs and the abuse and mistreatment during Plaintiffs' detention. The government largely ignores the latter category of actions and fails to show how either category of actions involved an element of judgment or choice as required under step one of the DFE. *See* Mot. Dismiss 12–18. The DFE therefore does not apply.

1. The Two-Year-Long Separation of Selvin Jr. From Selvin Sr. Did Not Involve Any Element of Judgment or Choice

Actions of government officials that separated Plaintiffs did not involve judgment or choice for two independent reasons. First, the zero-tolerance policy precluded officers from exercising any judgment or choice when they prosecuted Selvin Sr. for unlawful entry and separated him from his son. The name of the policy itself confirms that "zero" exceptions were permitted. Second, government officers unlawfully deported Selvin Sr., in contravention of the federal asylum law, prolonging Plaintiffs' separation for nearly two years. Government officials do not have discretion to violate federal laws, so these actions did not involve any element of judgment or choice.

(i) The zero-tolerance policy itself precluded any exercise of judgment or choice by individual officers who separated Plaintiffs.

Government actions must involve an element of judgment or choice for the DFE to apply. *Grammatico v. United States*, 109 F.3d 1198, 1200 (7th Cir. 1997) (citing *Gaubert*, 499 U.S. at 322). The inquiry "is not limited to decisions made at the policy or planning level, but rather extends to decisions at the operational level that are in furtherance of governmental policy." *Palay v. United States*, 349 F.3d 418, 429 (7th Cir. 2003) (citation omitted). "[A] court must first consider whether the action is a matter of choice for the acting employee." *Berkovitz*, 486 U.S. at 536.

The DFE does not shield torts committed by government employees if those employees could exercise no judgment or choice in the implementation of a policy. *See Palay,* 349 F.3d at 429–30. For example, in *Indian Towing*, the Supreme Court rejected the DFE defense for tort claims arising from the failure of Coast Guard maintenance personnel to properly maintain a lighthouse, "because such workers were not charged with deciding what level of maintenance inspections were necessary." *Palay*, 349 F.3d at 430 (citing *Indian Towing Co. v. United States*, 350 U.S. 61, 64, 69 (1955)). Therefore, even if the government's decision to enact a policy might fall within the DFE's scope, the United States is still liable for torts committed by its employees implementing the policy if those employees could not exercise judgment or choice.

That is precisely what occurred here. The zero-tolerance policy prohibited government employees from exercising any judgment or choice when criminally prosecuting Selvin Sr. and subsequently separating him from his then-minor son Selvin Jr. On April 6, 2018, then-Attorney General Sessions "directed each United States Attorney's Office along the Southwest Border . . . to adopt immediately a zero-tolerance policy for all offenses referred for prosecution under [8 U.S.C. §] 1325(a)." Memorandum from the U.S. Dep't of Just., Off. of the Att'y Gen., Memorandum for Federal Prosecutors Along the Southwest Border (Apr. 6, 2018), https://www.justice.gov/opa/press-release/file/1049751/download. The Attorney General clarified that "[t]his zero-tolerance policy shall *supersede any existing policies.*" *Id.* (emphasis added). By implementing the zero-tolerance policy, "then-Attorney General Sessions 'prescribe[d] a course of action for [federal] employee[s] to follow.'" *C.D.A. v. United States,* No. CV 21-469, 2023 WL

2666064, at *14 (E.D. Pa. Mar. 28, 2023). The unqualified mandate of the zero-tolerance policy, deprived government employees who separated migrant families under the policy of any judgment or choice for purposes of the DFE analysis. *Id.*; *P.G. v. United States*, No. 21-cv-4457, 2022 WL 3024319, at *4 (N.D. Cal. May 10, 2022) ("Since the family separation policy was a policy prescribed by the Trump Administration, the front-line employees tasked with implementing the policy did not reasonably have any element of choice.").

The government argues that it enjoys the protection of the DFE because the zero-tolerance policy simply "amounts to exercise of the prosecutorial discretion . . . confer[red] on the Attorney General." Mot. Dismiss 13 (citation omitted). The cases it cites adopt this myopic definition of discretion. *See, e.g.*, *S.E.B.M. v. United States*, 2023 WL 2383784, at *14 (D.N.M. Mar. 6, 2023). However, this argument misses the mark. The first step of the DFE analysis is not limited to whether the government itself has discretion to enact policies. *Palay*, 349 F.3d at 429. Instead, the DFE analysis considers the actions of *individual officers* in charge of implementing a broader policy, who "must be charged with making policy-related judgments in order for [their] choices to qualify for the [DFE]." *Id.* at 430. The zero-tolerance policy eliminated prosecutorial discretion of individual officers. *See Mayorov v. United States*, 84 F.Supp.3d 678, 690–91 (N.D. Ill. 2015) (denying DFE because the government officer lacked the authority to exercise discretion in making detainer determinations and using this fact to "distinguish[] . . . from the mine-run prosecutorial discretion cases"); *C.D.A.*, 2023 WL 2666064, at *14 ("While prosecutors are typically afforded an abundance of choice in their decisions, the Attorney General had explicitly directed the United States Attorney's Offices at the United States–Mexico border to prosecute *all* instances of illegal entry.").

(ii) The extended separation of Plaintiffs resulted from government officers' violations of the federal asylum law.

A government official does not have discretion to violate a federal statute, regulation, or policy. *Palay,* 349 F.3d at 431. Officials violated federal law by denying Selvin Sr. statutorily mandated credible fear procedures and unlawfully deporting him. Compl. ¶¶ 73–76, 79. In *Ms. L*, a class action in which Selvin Sr. was a named plaintiff (referred to as S.A.C.), the court held that Selvin Sr.'s deportation was unlawful because the government violated asylum law. *Ms. L.*, 403 F.Supp.3d at 867–68. Specifically, government officers never informed Selvin Sr. of the disposition of his credible fear interview or provided him a legally-required opportunity to seek review of his credible fear disposition before an immigration judge, as required by law. *Id.* (citing 8 C.F.R. § 208.30(g)(1)). The court found that the government could not refute Selvin Sr.'s allegation that officers coerced him into signing documents in English, a language he does not speak, which might have led to his deportation. *Id.* Selvin Sr. raises similar allegations regarding officers' violations of asylum law. Compl. ¶¶ 64–65, 73–74.

The government must concede the illegality of Selvin Sr.'s deportation because "under the [FTCA] a federal court should apply [the] federal principles of res judicata and collateral estoppel in considering the preclusive effect of a prior federal judgment." *Johnson v. United States*, 576 F.2d 606, 612, 615 (5th Cir. 1978) (holding that the United States could not relitigate a finding of liability from a previous FTCA suit for the same tortious conduct challenged in a new FTCA suit by a different plaintiff); *see also Bowen v. United States*, 570 F.2d 1311, 1320 (7th Cir. 1978) (finding that a plaintiff's previously administratively adjudicated claim collaterally estopped an FTCA suit but noting that "[t]here is no reason that the United States would not likewise have been estopped had the relevant facts been adjudicated in favor of plaintiff in the [previous] proceeding"). While Plaintiffs' initial separation resulted from the government prosecuting Selvin Sr., as mandated by the zero-tolerance policy, the government's violation of federal asylum law, as held in *Ms. L.*, caused Plaintiffs' prolonged separation. As a result, the government is barred from claiming an exemption under the DFE.

The government argues that it had discretion to separate Plaintiffs because it had discretion to criminally prosecute Selvin Sr., which led to his son being detained separately. *See* Mot. Dismiss 12.[1] Even if that were true, any discretion to separate Plaintiffs ceased the moment Selvin Sr.'s criminal case ended and he was returned to immigration detention. Instead, the government continued to detain Plaintiffs in detention facilities hundreds of miles apart from each other until the government unlawfully deported Selvin Sr. in violation of federal asylum law. Compl. ¶¶ 72, 76. Plaintiffs suffered irreparable injuries arising from their protracted separation. Selvin Jr.'s young age compounded these injuries. *See* Compl. ¶¶ 81–85, 87.

2. Officers' Mistreatment of Plaintiffs in Detention Following the Separation Did Not Involve Any Element of Judgment or Choice

The officers' various forms of mistreatment of Plaintiffs while they were separated and detained did not involve those officers' exercise of judgment or choice for two reasons. First, the alleged mistreatments violated federal law governing conditions of confinement and official conduct. Second, the mistreatments and abuse emanate from officials' separation of Plaintiffs, which the officers had no discretion but to execute under the zero-tolerance policy.

(i) Officers' mistreatment of Plaintiffs violated federal law.

Government officials do not have discretion to plainly violate governing statutes, regulations, and policies. *Berkovitz*, 486 U.S. at 544; *Palay,* 349 F.3d at 431. Officials'

[1] The government also cites cases showing that the government has discretion to decide where to detain noncitizens during removal proceedings. Mot. Dismiss 14–15. But Selvin Sr. and Selvin Jr. were not merely detained in separate facilities. Selvin Sr. was deported from the country, in direct violation of federal asylum law, which precipitated a separation lasting over two years.

mistreatment of Plaintiffs in contravention of laws, regulations and policies in detention therefore involved no judgment or choice. CBP's National Standards on Transport, Escort, Detention, and Search (TEDS) mandate official standards and conditions of confinement in ICE detention facilities. U.S. Customs and Border Protection, *National Standards on Transport, Escort, Detention, and Search* (2015) [hereinafter TEDS]. The *Flores* Agreement, a binding settlement on the United States between federal immigration agencies and minors in immigration custody, similarly imposes minimum standards regarding the detention of children. Settlement Agreement, *Flores v. Reno*, No. CV 85-4544-RJK(Px) (C.D. Cal. Jan. 17, 1997) [hereinafter *Flores* Agreement]. Government officials subjected Plaintiffs to abuse, protracted separation and inhumane conditions of confinement, violating the abovementioned mandated policies and standards. Therefore, this mistreatment is not shielded by the DFE.

First, the government subjected Plaintiffs to freezing temperatures, violating TEDS § 4.6 and the *Flores* Agreement. *See D.A. v. United States*, EP-22-CV-00295-FM, 2023 WL 2619167, at *12 (W.D. Tex. Mar. 23, 2023) (clarifying that TEDS § 4.6 sets a "minimum standard below which temperatures may not fall: the comfort of detainees"); *Flores* Agreement ¶ 12(A) (requiring detention facilities provide "adequate temperature control"); Compl. ¶¶ 6, 8, 31, 42, 59. TEDS §§ 4.7, 4.12, and 5.6 require detainees "be provided with clean bedding and prohibit officers from using temperature controls in a punitive manner." *A.E.S.E. v. United States*, No. 21-CV-0569 RB-GBW, 2022 WL 4289930, at *10 (D.N.M. Sept. 16, 2022) (internal quotation marks omitted). The conditions of Plaintiffs' confinement clearly violated the TEDS standards and the *Flores* Agreement. Compl. ¶¶ 31, 59.

Second, the government denied Plaintiffs sufficient and sanitary drinking water and food. *See* Compl. 6, 8, 35, 61–62. TEDS §§ 4.13, 4.14, and 5.6 "require [detention] facilities to always have clean drinking water . . . regularly scheduled mealtimes, with at least two meals served hot to juvenile detainees." *A.E.S.E.,* 2022 WL 4289930, at *10. The *Flores* Agreement also requires that "[f]acilities [that house minors] [] provide . . . drinking water." *See A.E.S.E.,* 2022 WL 4289930, at *10. Officers violated this standard when they deprived Selvin Jr. of adequate, sanitary water and forced him to compete with 70 other children for a gallon of water. Compl. ¶¶ 35, 40.

Third, the government denied Plaintiffs of basic hygiene. Compl. ¶¶ 33, 41, 60, 68. Governing standards provide that "facilities must be regularly and professionally cleaned and sanitized and that detainees must be provided with basic personal hygiene items." *A.E.S.E.,* 2022 WL 4289930, at *10 (citing TEDS Standards §§ 4.6, 4.7, 4.11, and 5.6) (internal quotation marks omitted); *see also Flores* Agreement 12(A).

Fourth, the government denied contact between Selvin Sr. and his minor son, Selvin Jr. Compl. ¶¶ 38, 63, 67, 72. The *Flores* Agreement "require[s] that [INS] successor organizations house unaccompanied minors in facilities that provide 'contact with family members who were arrested with' them." *D.A.,* 2023 WL 2619167, at *7 (citing *Flores* Agreement ¶ 12). In *D.A.*, the court held that the *Flores* Agreement removed the government's discretion to prohibit contact between children and parents. *Id.*

Fifth, the government failed to act in accordance with mandated standards of integrity and professionalism. TEDS §§ 1.2, 1.4 and 5.1 "require that CBP employees must speak and act with the utmost integrity and professionalism" and "treat all individuals with dignity and respect and in a non-discriminatory manner." *A.E.S.E.,* 2022 WL 4289930, at *12 (internal quotation marks omitted). Here, government officials failed standards of professionalism by subjecting Selvin Jr. to physical assault, sleep deprivation, and verbal abuse. Compl. ¶¶ 28, 30, 32, 37, 43–44.

Because TEDS and *Flores* Agreement gave officials no opportunity to exercise discretion in the provision and denial of Plaintiffs' basic needs, the DFE fails at the first step. The Court need not examine these decisions under the second prong.

(ii) The claims arising from the mistreatments all stem from the nondiscretionary separation of Plaintiffs.

Even if the Court finds that the abuse and mistreatment involved an element of judgment or choice, the DFE still does not shield the government because the mistreatment emanated from the separation, which government employees had no discretion but to enforce under the zero-tolerance policy. Several district courts have held that, where government officers lacked discretion regarding the separation of migrant families as prescribed by the zero-tolerance policy, the DFE also did not bar claims arising from the government officers' subsequent mistreatment of separated families. *C.D.A.*, 2023 WL 2666064, at *14 (internal citation omitted) (holding that the DFE did not apply to acts of separation and mistreatment which "ultimately emanated from the . . . zero-tolerance policy" that "prescribed" a course of action officers had to follow); *A.P.F. v. United States*, 492 F. Supp. 3d 989, 996 (D. Ariz. 2020) (holding that the separation of plaintiffs was not discretionary and then that "[b]ecause each of [p]laintiffs' causes of action stem from this separation, none are barred by the [DFE]"). In *A.P.F.*, the court explained that the alleged mistreatment of plaintiffs such as those relating to "conditions of confinement," and "treatment of [p]laintiff [c]hildren during and after the separations" were all aimed at "demonstrating the harm resulting from the separations." *A.P.F.*, 492 F. Supp. at 996–97. Here, too, the Court should deny the DFE because Plaintiffs' claims arising from the government officers' mistreatment all stem from the separation, which government officials had no choice but to carry out.

B. Even if the Court Finds that the Challenged Actions Involved an Element of Judgment or Choice, the Challenged Actions Are Not of the Kind Shielded by the DFE

Even if officers engaged in some judgment or choice, the government nonetheless cannot demonstrate officials' conduct was a permissible exercise of policy judgment. First, government officials' actions that by default cause injuries cannot be the result of permissible policy analysis. Second, the conduct was unconstitutional and therefore cannot be a permissible exercise of policy judgment. Finally, officers' mistreatment of Plaintiffs in detention was not the result of a policy judgment at all.

1. Even if officers rendered policy decisions, those decisions were impermissible.

Neither the Supreme Court nor the Seventh Circuit has clearly defined the dividing line between "permissible" and "impermissible" policy judgment. Still, courts have repeatedly held that the DFE does not shield government officers' injury-causing actions that have no proper basis in legitimate policy considerations. *See Palay*, 349 F.3d at 432 (noting that the DFE would not apply to claims arising from the corrections officer's negligent or careless monitoring of a prison unit); *Keller v. United States*, 771 F.3d 1021, 1025 (7th Cir. 2014) (refusing to apply DFE where record permitted inference that government actions were based on laziness or inattentiveness rather than "grounded in public policy considerations"); *Ruiz v. United States*, 13-CV-1241 KAM SMG, 2014 WL 4662241, at *8 (E.D.N.Y. Sept. 18, 2014) (holding that CBP officers inadequately feeding a four-year-old child and causing undue delay in contacting her parents as a result of negligence or laziness does not "constitute a considered judgment grounded in social, economic, or political policies").

Here, it was inevitable that suddenly and forcibly separating a parent and minor child would cause considerable trauma. Indeed, "the ['Zero Tolerance'] policy demanded agents to inflict emotional distress . . . that, by default, generate[d] tortious injuries." Brendan Joseph Pratt, Comment, *Cages and Compensatory Damages: Suing the Federal Government for Intentional Infliction of Emotional Distress*, 68 UCLA L. Rev. 288, 320–21 (2021). The policy was met with almost universal condemnation when it became known to the public. Compl. ¶ 87. Members of Congress decried the family separation policy as "inhuman and un-American."[2] Even the government is unwilling to stand behind the policy and its effects. Mot. Dismiss 1. In light of such widespread disavowal of the acts of family separation, surely that conduct cannot be of the sort the DFE is intended to shield. Under the zero-tolerance policy, separation was not a "necessary incident of detention," but was instead the "result of an *unnecessary* governmental action . . . separat[ing] family units who were arrested *together*." *Ms. L. v. U.S. Immigr. & Customs Enf't*, 302 F. Supp. 3d 1149, 1162–63 (S.D. Cal. 2018). An unnecessary action, widely decried, and resulting in objectively foreseeable injuries cannot constitute a permissible policy judgment.

2. Government Officials Acted Unconstitutionally

The government also fails the second step of the DFE because the officers' actions were unconstitutional and therefore cannot be the result of permissible policy judgment that the DFE shields. *See Gaubert*, 499 U.S. at 322–23. It is not permissible for government officers to violate the constitution in making their policy judgements.

The majority of circuits have held, or expressed in dicta, that government officers do not have "discretion" to violate the Constitution just as officers do not have "discretion" to violate

[2] *Oversight of Family Separation and U.S. Customs and Border Protection Short-Term Custody Under the Trump Administration*, 116th Cong. 116–42, at 63 (2019) (Rep. Nadler, Chairman, H. Comm. on the Judiciary); *see id.* at 2–3 ("No administration has resorted to the cruelty of systematically separating kids from their parents as a method of deterrence.").

federal statutes, regulations, or policy.[3] While the Seventh Circuit has rejected this argument in the context of the first step of the DFE,[4] it has not considered whether the unconstitutionality of officers' actions may be relevant under the second step. In *Linder v. United States*, the Seventh Circuit rejected the plaintiff's constitutional arguments to defeat the DFE defense but limited its analysis to the first step. *See* 937 F.3d 1087, 1090–91 (7th Cir. 2019). Namely, the plaintiff in *Linder* argued that the government failed the first step because its officers did not have discretion to engage in certain actions which were "proscribed" by the Fifth and Sixth Amendments. Brief for Appellant at 6–7, *Linder*, 937 F.3d 1087 (No. 15-1501), 2018 WL 6738732. The plaintiff did not raise an alternative constitutional argument under the second step. *Id.* The Seventh Circuit's holding would thus be limited to the arguments raised before it. *See Hormel v. Helvering*, 312 U.S. 552, 556 (1941) ("Ordinarily an appellate court does not give consideration to issues not raised below.").

Moreover, the *Linder* opinion itself suggests that constitutional arguments are only barred under the first step. *Linder*, 937 F.3d at 1090–91. The opinion notes that constitutional violations are irrelevant to determining whether the challenged actions involved "discretion," an inquiry only under the first step. *Id.* at 1090. The opinion's reference to the "abuse of discretion" proviso in the DFE's text reinforces this narrower reading because this proviso concerns merely whether the

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[3] *Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015, 1065 (9th Cir. 2020) ("[T]he Constitution can limit the discretion of federal officials such that the FTCA's [DFE] will not apply.") (citation omitted); *Martinez v. United States*, 822 F. App'x 671, 676 (10th Cir. 2020) ("Most circuits also have held conduct is not discretionary when it 'exceeds constitutional bounds.'"); *Loumiet v. United States*, 828 F.3d 935, 943 (D.C. Cir. 2016) (holding the DFE does not provide immunity from unconstitutional conduct); *Limone v. United States*, 579 F.3d 79, 102 (1st Cir. 2009) (same); *Raz v. United States*, 343 F.3d 945, 948 (8th Cir. 2003) (same); *Medina v. United States*, 259 F.3d 220, 225 (4th Cir. 2001) ("federal officials do not possess discretion to violate constitutional rights"); *U.S. Fid. & Guar. Co. v. United States*, 837 F.2d 116, 120 (3d Cir. 1988) (same); *Sutton v. United States*, 819 F.2d 1289, 1293 (5th Cir. 1987) (same); *Myers & Myers Inc. v. USPS*, 527 F.2d 1252, 1261 (2d Cir. 1975) (same).

[4] Plaintiffs do not waive their argument that unconstitutional acts by government officers, as challenged here, also fail the first step of the DFE analysis, in light of the majority of circuits barring discretion to violate the Constitution in the FTCA context.

officer's action involves "discretion," *see* 28 U.S.C. § 2680(a), and does not incorporate the second step relating to officers' policy analysis, a prudential prong created by the Supreme Court based on legislative history. *See Berkovitz*, 486 U.S. at 536–37; *see also United States v. Varig Airlines*, 467 U.S. 797, 814 (1984). This Court should allow Plaintiffs to prevail on the second-step inquiry on constitutional grounds.

The officers' actions were unconstitutional on two separate grounds. First, the officers' actions violated Plaintiffs' constitutional right to family integrity under the Fifth Amendment. A constitutional right to family integrity is an interest long recognized by the Supreme Court. *See, e.g., Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion) ("[T]he interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests recognized by this Court.") (collecting cases). While the government may have an interest in protecting the welfare of children, the interest of a parent in his child "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

Numerous courts, including this Court, have upheld the fundamental right to family integrity in the context of family separations pursuant to the zero-tolerance policy. *See, e.g., W.S.R. v. Sessions*, 318 F. Supp. 3d 1116, 1125–26 (N.D. Ill. 2018) (granting partial preliminary injunctive relief and finding children had a "right to reunify with [their] parent in immigration custody, after the parent's criminal detention end[ed] and absent parental unfitness or danger to the child"); *D.A.*, 2023 WL 2619167, at *9; *D.J.C.V. v. United States*, 605 F. Supp. 3d 571, 594–95 (S.D.N.Y. 2022); *J.S.R. ex rel. J.S.G. v. Sessions*, 330 F. Supp. 3d 731, 741–42 (D. Conn. 2018); *M.G.U. v. Nielsen*, 325 F. Supp. 3d 111, 118–21 (D.D.C. 2018); *Jacinto-Castanon v. U.S. Immigr. & Customs Enf't*, 319 F. Supp. 3d 491, 499–500 (D.D.C. 2018); *Ms. L. v. U.S. Imm. & Customs*

Enf't, 310 F. Supp. 3d 1133, 1142–44 (S.D. Cal. 2018). Here, too, the officers separated Plaintiffs and kept them apart until unlawfully deporting Selvin Sr. Compl. ¶¶ 23–26, 28, 38, 45, 47–48, 58 63, 76. The separation was forcible and non-consensual, and traumatized both the son and father. *Id.* The government's actions endangered Selvin Jr.'s welfare and "evince[ed] the conscience-shocking nature of . . . forced family separation[]" that violated Plaintiffs' right to family integrity. *D.A.*, 2023 WL 2619167, at *9; *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998).

Second, the officers violated Plaintiffs' procedural due process rights by separating them without any meaningful opportunity to be heard and coercing Selvin Sr. into foregoing his right to asylum. Compl. at ¶¶ 64–66, 73–74, 76; *D.A.*, 2023 WL 2619167, at *9 (denying DFE where officers separated families without any "meaningful opportunity to be heard"); *D.J.C.V.*, 605 F. Supp. 3d at 592, 595 (same); *B.A.D.J. v. United States*, No. CV-21-00215-PHX-SMB, 2022 WL 11631016, at *3 (D. Ariz. Sept. 30, 2022) (same); *see also Brokaw v. Mercer City*, 235 F.3d 1000, 1020 (7th Cir. 2000) (holding that a minor's removal from parents based on government officials' knowing misrepresentation of facts violated his due process rights).

3. Officers' Mistreatment and Abuse of Plaintiffs in Custody was Not the Result of a Policy Choice

The DFE's second step "protects only governmental actions and decisions based on considerations of public policy." *Gaubert*, 499 U.S. at 323 (quoting *Berkovitz*, 486 U.S. at 537). The abuse of Plaintiffs was not the result of a policy choice. There is simply no public policy that could authorize abuse of noncitizens in immigration detention. Officers kicked Selvin Jr. and verbally assaulted both Plaintiffs. They delayed Selvin Jr.'s reunification with his father and denied contact between Plaintiffs. Officers tolerated unsafe conditions such as allowing young boys to fight as guards watched, provided insufficient water and food, deprived Plaintiffs of appropriate hygiene supplies, and maintained "freezing" temperatures without providing blankets. *See*

A.E.S.E., 2022 WL 4289930, at *8. The government offers no public policy rationale authorizing physical and verbal abuse of Plaintiffs because there is none. Mot. Dismiss 12–19.

Applicant Details

First Name	**Won**
Middle Initial	**S**
Last Name	**Lee**
Citizenship Status	**U. S. Citizen**
Email Address	**won.lee@wustl.edu**
Address	**Address** Street **12847 Daylight Drive APT 1217** City **Saint Louis** State/Territory **Missouri** Zip **63131** Country **United States**
Contact Phone Number	**9095417652**

Applicant Education

BA/BS From	**University of Southern California**
Date of BA/BS	**May 2012**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 15, 2023**
Class Rank	**I am not ranked**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

D'Onfro, Danielle
donfro@wustl.edu

Tokarz, Karen
tokarz@wustl.edu
314-935-6414

Osgood, Russell
rosgood@wustl.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Won Lee
12847 Daylight Dr. Apt. 1217
St. Louis, Missouri 63131
(909) 541-7652
won.lee@wustl.edu

May 24, 2023

The Honorable Juan R. Sanchez
U.S. District Court for the Eastern District of Pennsylvania

Dear Judge Sanchez:

I am writing to apply for a clerkship in your chambers beginning in 2024. I graduated from Washington University School of Law. I have been offered a position as a litigation associate starting Fall 2023 at Husch Blackwell's Saint Louis office. I will have 1 year of legal work experience post-law school by the clerkship term start date.

Prior to starting at Washington University School of Law, I served as a surface warfare officer in the United States Navy. In this position, I was given an opportunity to develop as a professional and a leader with the following principles: formality, procedural compliance, level of knowledge, questioning attitude, forceful backup, and integrity. I currently remain in the United States Navy Reserve while in law school. After completing 1L, I was mobilized which required me to take a leave of absence from law school for one full year in order to serve as a staff officer for a task force commodore in a high-threat operating area.

Since my return, I have interned at Legal Services of Eastern Missouri and recently completed an externship with Magistrate Judge Gilbert Sison at the U.S. District Court for the Southern District of Illinois. As a judicial extern for Judge Sison, I had the opportunity to experience the operation of a federal courthouse, learn the federal civil and criminal procedures, conduct substantive legal research, and draft orders for the judge.

Enclosed please find my résumé, transcripts, and writing sample. The writing sample is an assignment I completed for the legal practice course, not edited by others. The following individuals are submitting letters of recommendation and welcome any inquiries regarding my application.

Dean Russell Osgood	Professor Danielle D'Onfro	Professor Karen Tokarz
Washington University	Washington University	Washington University
School of Law	School of Law	School of Law
rosgood@wustl.edu	donfro@wustl.edu	tokarz@wustl.edu
(314) 935-4042	(314) 935-6404	(314) 935-6414

I welcome any opportunity to interview with you. Thank you very much for your time and consideration.

Sincerely,
Won Lee

Won Lee

(909) 541-7652 | won.lee@wustl.edu

EDUCATION

Washington University in St. Louis, Juris Doctor — May 2023
- Dean's Leadership Award, Lewis "Red" Mills Veterans Scholar in Law

University of Chicago, Master of Arts in International Relations — Aug 2013

University of Southern California, Bachelor of Arts in International Relations — May 2012
- Phi Beta Kappa, Departmental Honors, *magna cum laude*

SELECTED EXPERIENCE

United States Navy Reserve — Oct 2018 – Present
Surface Warfare Officer, Navy Reserve Center Saint Louis — Bridgeton, MO
- Amphibious Operations Officer and Staff Material Officer for NR Expeditionary Strike Group Seven
- Served as Battle Watch Captain at the Task Force 76 and 3rd Marine Expeditionary Brigade joint HQ

Washington University School of Law — Aug 2021 – May 2023
Research Assistant, Professor John D. Inazu — Saint Louis, MO
- Conducted legal, academic, and open source research on advanced topics in the First Amendment jurisprudence
- Edited and provided substantive feedback on scholarly articles, periodicals, essays, and other various publications

U.S. District Court for the Southern District of Illinois — Jan – May 2023
Judicial Extern, Magistrate Judge Gilbert C. Sison — East Saint Louis, IL
- Observed judicial proceedings, hearings, and bench and jury trials in various levels of federal and state courts
- Analyzed court documents and researched legal issues to draft of judgments, decisions, and orders for the judge

Husch Blackwell, LLP — Jul – Aug 2020 / May – Jul 2022
Summer Associate, Saint Louis Office — Clayton, MO
- Produced substantive work products by researching complex legal issues working closed with licensed attorneys
- Attended meetings, trainings, and business functions in various practice specialty centers and strategic business units

Legal Services of Eastern Missouri — Aug – Dec 2021
Clinic Intern, Education Justice Program — Saint Louis, MO
- Researched various legal issues in education law and drafted substantive work products and documents
- Participated in alternative dispute resolutions for pro se parties in court mediations under attorney supervision
- Performed fact investigations, client interviews, and case developments in support of legal representations

United States Navy — Apr 2014 – Sep 2018 / Oct 2020 – Jul 2021
Department Head, Destroyer Squadron 50 — Manama, Bahrain
- Directed force protection plans for port visits, multilateral exercises, and distinguished visitors in high threat area
- Planned health protection measures and operational risk management for COVID-19 Operational Planning Team
- Executed tactical operations of IMSC Coalition Task Force Sentinel in the Middle East as the senior watch officer

Assistant Department Head, Afloat Training Group West Pacific — Yokosuka, Japan
- Certified trainings of forward deployed ships in Seamanship, Navigation, Aviation, Medical, and Search and Rescue
- Taught English to Japanese Maritime Self Defense Force junior officers at the Second Maritime Service School
- Served as Strategic Operations Officer in CPX Key Resolve for UN Combined Forces Command in South Korea

MISCELLANEOUS

- Military Awards: Navy Commendation Medal w/ gold star, Navy Achievement Medal
- Foreign Languages: Korean (DLPT 3/3/3), Japanese (DLPT 2/2+)
- Volunteering: Service to School Law School Ambassador

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Washington University in St. Louis
Office of the University Registrar

Record Of: **Lee, Won**
Student ID Number: 479148

Degrees Awarded:
JURIS DOCTOR MAY 10, 2023

Transcript Issued 06/06/2023 To:

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2019

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0	CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (DROBISH)	LAW	W74 500U	2.0	A-
CONTRACTS (P. SMITH)	LAW	W74 501A	4.0	A-
PROPERTY (BONI-SAENZ)	LAW	W74 507Y	4.0	B+
TORTS (ROZEMA)	LAW	W74 515L	4.0	B+

Enrolled Units 14.0 Semester GPA 3.55 Cumulative Units 14.0 Cumulative GPA 3.55

Spring Semester 2020

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0	P
LEGAL PRACTICE II: ADVOCACY (DROBISH)	LAW	W74 500Z	2.0	CR
CRIMINAL LAW (OSGOOD)	LAW	W74 502D	4.0	CR
NEGOTIATION (HOLLANDER-BLUMOFF)	LAW	W74 503C	1.0	CR
CIVIL PROCEDURE (P. KIM)	LAW	W74 506G	4.0	CR
CONSTITUTIONAL LAW I (MAGARIAN)	LAW	W74 520L	4.0	CR

Enrolled Units 16.0 Semester GPA 0 Cumulative Units 30.0 Cumulative GPA 3.55

Fall Semester 2021

ETHICS AND PROFESSIONALISM IN THE PRACTICE OF LAW (PRATZEL)	LAW	W74 562C	2.0	A-
MEDIATION THEORY & PRACTICE (TOKARZ)	LAW	W74 578A	3.0	A-
SUPERVISED RESEARCH	LAW	W74 695	1.0	CR
CIVIL RIGHTS, COMMUNITY JUSTICE & MEDIATION CLINIC	LAW	W74 769E	6.0	HP
CIVIL RIGHTS & MEDIATION CLINIC - CREDIT (TOKARZ)	LAW	W74 769F	2.0	CR

Enrolled Units 14.0 Semester GPA 3.82 Cumulative Units 44.0 Cumulative GPA 3.67

Spring Semester 2022

INTERNATIONAL BUSINESS	MGT	B63 512	3.0	A-
INTERNATIONAL LAW (SADAT)	LAW	W74 553B	3.0	A-
COPYRIGHT & RELATED RIGHTS (COLLINS)	LAW	W74 643C	3.0	B
SUPERVISED RESEARCH	LAW	W74 695	2.0	CR
WAR, WAR CRIMES & CRIMES AGAINST HUMANITY SEMINAR (SADAT)	LAW	W76 737S	3.0	B+

Enrolled Units 14.0 Semester GPA 3.48 Cumulative Units 58.0 Cumulative GPA 3.62

Fall Semester 2022

CORPORATIONS (D'ONFRO)	LAW	W74 538U	3.0	A
TRUSTS & ESTATES (DAVIS)	LAW	W74 575P	3.0	A

Keri A. Disch
Keri A. Disch, University Registrar

Washington University in St. Louis
Office of the University Registrar

Record Of: **Lee, Won**
Student ID Number: 479148

Fall Semester 2022

CHINESE LAW (LIN)	LAW	W74 582F	3.0	A
SUPERVISED RESEARCH	LAW	W74 695	2.0	CR
INTERNATIONAL CRIMINAL LAW (SADAT)	LAW	W74 713A	3.0	A-

Enrolled Units 14.0 Semester GPA 3.78 Cumulative Units 72.0 Cumulative GPA 3.66

Spring Semester 2023

LAW AND PSYCHOLOGY (HOLLANDER-BLUMOFF)	LAW	W74 550B	3.0	B+
SPEECH, PRESS, & THE CONSTITUTION (MAGARIAN)	LAW	W74 609M	3.0	A-
JUDICIAL CLERKSHIP EXTERNSHIP	LAW	W74 654E	3.0	CR
INTRODUCTION TO ENERGY LAW (PERRYMAN)	LAW	W74 691E	1.0	A
SUPERVISED RESEARCH	LAW	W74 695	1.0	CR
AMERICAN LEGAL HISTORY (RUSSELL)	LAW	W74 698D	3.0	B+

Enrolled Units 14.0 Semester GPA 3.53 Cumulative Units 86.0 Cumulative GPA 3.64

Remarks

SP2020 SPECIAL NOTE: DURING THE SPRING OF 2020, A GLOBAL PANDEMIC REQUIRED SIGNIFICANT CHANGES TO COURSEWORK. UNUSUAL ENROLLMENT PATTERNS AND GRADES MAY REFLECT THE TUMULT OF THE TIME.
FL2020 LEAVE OF ABSENCE MILITARY SERVICE
FL2021 NOTE: SUPERVISED RESEARCH (PROF. INAZU): ADVANCED TOPICS IN THE FIRST AMENDMENT
SP2022 FROM: OLIN BUSINESS SCHOOL LAW SCHOOL ELECTIVE 3.0 UNITS
SP2022 NOTE: SUPERVISED RESEARCH (PROF. INAZU): ADVANCED TOPICS IN THE FIRST AMENDMENT
FL2022 NOTE: SUPERVISED RESEARCH (PROF. INAZU): ADVANCED TOPICS IN THE FIRST AMENDMENT
SP2023 NOTE: SUPERVISED RESEARCH (PROF. INAZU): ADVANCED TOPICS IN THE FIRST AMENDMENT

Distinctions, Prizes and Awards

FL2021 DEAN'S LIST
FL2022 DEAN'S LIST
SP2023 DEAN'S LEADERSHIP AWARD

** **END OF TRANSCRIPT** **

Keri A. Disch
Keri A. Disch, University Registrar

Washington University in St. Louis
Office of the University Registrar
One Brookings Drive, Campus Box 1143, St. Louis, MO 63130-4899 www.registrar.wustl.edu 314-935-5959

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Degrees conferred by Washington University and current programs of study appear on the first page of the transcript. The Degrees Awarded section lists the date of award, the specific degree(s) awarded and the major field(s) of study.

Courses in which the student enrolled while at Washington University are listed in chronological order by semester, each on a separate line beginning with the course title followed by the academic department abbreviation, course number, credit hours, and grade.

Honors, awards, administrative actions, and transfer credit are listed at the end of the document under "Distinctions, Prizes and Awards" and "Remarks".

Course Numbering System
In general course numbers indicate the following academic levels: courses 100-199 = first-year; 200-299 = sophomore; 300-399 = junior; 400-500 = senior and graduate level; 501 and above primarily graduate level. The language of instruction is English unless the course curriculum is foreign language acquisition.

Unit of Credit/Calendar
Most schools at Washington University follow a fifteen-week semester calendar in which one hour of instruction per week equals one unit of credit. Several graduate programs in the School of Medicine and several master's programs in the School of Law follow a year-long academic calendar. The Doctor of Medicine program uses clock hours instead of credit hours.

Academic and Disciplinary Notations
Students are understood to be in good academic standing unless stated otherwise. Suspension or expulsion, i.e. the temporary or permanent removal from student status, may result from poor academic performance or a finding of misconduct.

Grading Systems
Most schools within Washington University employ the grading and point values in the Standard column below. Other grading rubrics currently in use are listed separately. See www.registrar.wustl.edu for earlier grading scales, notably for the School of Law, Engineering prior to 2010, Social Work prior to 2009 and MBA programs prior to 1998. Some programs do not display GPA information on the transcript. Cumulative GPA and units may not fully describe the status of students enrolled in dual degree programs, particularly those from schools using different grading scales. Consult the specific school or program for additional information.

Rating	Grade	Standard Points	Social Work
Superior	A+/A	4	4
	A-	3.7	3.7
	B+	3.3	3.3
Good	B	3	3
	B-	2.7	2.7
	C+	2.3	2.3
Average	C	2	2
	C-	1.7	1.7
	D+	1.3	0
Passing	D	1	0
	D-	0.7	0
Failing	F	0	0

Grade	Law Values (Effective Class of 2013)
A+	4.00-4.30
A	3.76-3.94
A-	3.58-3.70
B+	3.34-3.52
B	3.16-3.28
B-	3.04-3.10
C+	2.92-2.98
C	2.80-2.86
D	2.74
F	2.50-2.68

Additional Grade Notations			
AUD	Audit	NC/NCR/NCR#	No Credit
CIP	Course in Progress	NP	No Pass
CR/CR#	Credit	P/P#	Pass
E	Unusually High Distinction	PW	Permitted to Withdraw
F/F#	Fail	R	Course Repeated
H	Honors	RW	Required to Withdraw
HP	High Pass	RX	Reexamined in course
I	Incomplete	S	Satisfactory
IP	In Progress	U	Unsatisfactory
L	Successful Audit	W	Withdrawal
LP	Low Pass	X	No Exam Taken
N	No Grade Reported	Z	Unsuccessful Audit

(revised 11/2020)

Washington University in St. Louis
SCHOOL OF LAW

March 24, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

RE: Recommendation for Won Lee

Dear Judge Sanchez:

I am writing to recommend my student, Won Lee, for a clerkship. Won is an outstanding and mature student who I am confident will excel in your chambers.

I had the pleasure of teaching Won in Corporations in the fall of 2022. Won was arguably the closest reader in the class of nearly 100: he was always ready for a cold-call and asked thoughtful questions along the way. Indeed, as I revise my notes for next year's class, a number of my revisions are to account for Won's questions!

Won was a frequent visitor to office hours where I was able to see that he is personable, organized, and curious. I was particularly impressed by the effort that he put into answering any question himself before bringing that question to me. It was not uncommon for him to have read and considered three or four sources before coming to me with a problem. I believe that this diligence alone is likely to make him an excellent clerk. I was not at all surprised to learn that Won wrote one of the strongest exams even though he did not enter class with any background in corporate finance or business.

As you will see on his resume, Won has spent years as an active-duty officer in the US Navy. Being committed to public service, he remained in the Navy Reserve during law school and was again called into active duty to support Operation Freedoms Sentinel after his 1L year. Completing this tour required Won to pause his studies and precluded him from participating in many extracurriculars, like a journal. Since returning to campus, Won has built connections to the legal community and is looking forward to life beyond law school.

In sum, Won will be a superb clerk. Please do not hesitate to be in touch if I can provide you with any additional information. Due to my travel schedule, the best way to reach me is by phone at 978-235-4906.

Best,

/s/

Danielle D'Onfro
Associate Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Washington University in St. Louis
SCHOOL OF LAW

March 17, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

RE: Recommendation for Won Lee

Dear Judge Sanchez:

I am writing to recommend Won Lee, one of our top third-year law students, for a judicial clerkship in your chambers. He is a very engaging and bright person. He has an inquisitive mind and excellent written and oral advocacy skills.

As director of our Negotiation & Dispute Resolution Program, I first met Won in my first-year Negotiation course, in which he excelled in every respect. Later, he was a student in two of my upper-level courses, in which he also excelled.

Won was a student in my Civil Rights & Mediation Clinic in fall 2021. He was based at Legal Services of Eastern Missouri in the Education Justice Program. His work was top-notch and he went above and beyond the required number of hours. He also far exceeded the number of assignments of the other clinic students. He was always thorough in his work with great attention to detail and accuracy, and almost always ahead of schedule. According to his field supervisor, he was always the “first one in and the last one out” – even on Zoom.

Won performed similarly well in my Mediation course that semester, where I observed him in multiple negotiation and mediation settings. He is thoughtful, confident, and assertive, without being argumentative. He relates well to people from all walks of life. He has excellent communication and listening skills, and fits well into any setting.

In sum, I have no doubt Won would be an asset to your chambers. Won is a tad bit older and mature than the typical law student. He has a personal and professional commitment to the highest quality work and the highest ethical standards. He is extremely diligent, conscientious, and hardworking – and, he is a very nice guy.

Please feel free to contact me if you need further information.

Best,

/s/

Karen Tokarz
Charles Nagel Professor of Public Interest Law & Public Service
Director of the Negotiation & Dispute Resolution Program
Director of the Civil Rights & Community Justice Clinic

Washington University School of Law
One Brookings Drive, MSC 1120-250
St. Louis, MO 63130
(314) 935-6420

Washington University in St. Louis
SCHOOL OF LAW

March 17, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

RE: Recommendation for Won Lee

Dear Judge Sanchez:

I write with great enthusiasm to recommend Won Lee, a third-year student at Washington University School of Law, for a clerkship. I am the Dean and a Professor of Law at Washington University School of Law. Before coming to Washington University, I was the President of Grinnell College (1998-2010) and, before that, the Dean (1988-1998) and a faculty member (1980-1998) at Cornell Law School in Ithaca, New York.

I became acquainted with Won when I had him as a student in our substantive Criminal Law course (law crimes and defenses) in the spring of 2020. Mid-semester the global pandemic forced all classes online. In spite of the challenges, Won was an active and thoughtful participant in the class. His engagement with the class material was evident in the paper he wrote on the treatment of self-harm under UCMJ in US v. Caldwell for which he received an A+. Because of the unusual circumstance no final grade were given in this course.

Won is an officer in U.S. Navy reserve (the branch of the military in which I served). In fall of 2021 he was called to active duty for a year. Won returned to the Law School later. His passion and enthusiasm for the law, reflected in a consistently strong academic performance. Won is committed to continuing to serve the St. Louis region and intends to practice law as a civil litigator. I recommend Won without any reservations. He is diligent, smart, serious, and resilient. He is mature and would be a respectable and fine colleague to have in chambers.

If you would like more information about Won Lee, please give me a call on my cell at 641-821-3712.

Best,

/s/

Russell K. Osgood
Dean
Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CYNTHIA WILLIAMS, Plaintiff,	)	
v.	)	Cause No. 20-000378-RBM
MARK BRUCE, *et al.*, Defendants.	)	

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT UNDER FED. R. CIV. P. 12(b)(6)

Professor Williams respectfully requests the Court to deny the Defendant's motion to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6). The Defendants ordered Professor Williams to change a student's grade of an "F" to a "B." When she refused to comply, the Defendants changed the grade and terminated her employment within a week. (Compl. ¶¶ 17, 19-21.) She seeks equitable and monetary relief under the 42 U.S.C. § 1983 against the Defendants for abridging her freedom of speech in violation of the First Amendment. The Defendants moved to dismiss alleging that no such violation occurred. The issue before the Court is whether the First Amendment to the U.S. Constitution protects academic freedom, and if so, whether (a) such protection extends to individual teachers employed by public universities and (b) grading is a form of speech protected by the First Amendment. The Defendants' motion to dismiss should be denied because academic freedom is a special concern of the First Amendment that should extend to individual teachers and grading is a form of speech from teachers to students. Restricting academic freedom of individual teachers imperils our nation, and the "four essential freedoms" of universities should extend to individual teachers to ensure the integrity of the schools. Even if the special protection of academic freedom is exclusive to universities, the speech of individual teachers to their students should not be compelled.

FACTUAL BACKGROUND

On December 13, 2019, the Defendants ordered Professor Williams to change one of her student's grade. (Compl. ¶ 19.) The student, Luke Johnson, is a lacrosse player who brought unprecedented success and publicity to the university. (Compl. ¶¶ 11-13.) For his athletic ability, the university gave Johnson special treatment. (Compl. ¶15.) Johnson enrolled in Professor Williams' class and subsequently received an "F" grade for missing fifteen out of twenty-eight sessions of the class and submitting a final paper that convinced her that he did not "actually read the novel or watch the movie." (Compl. ¶¶ 10, 16.) Under the collegiate athletic rules, an "F" grade would prevent him from playing lacrosse for the university. (Compl. ¶ 17.) While the Defendants could administratively change Johnson's "F" to a passing grade, doing so would require a reason to be included which, if leaked, could bring bad publicity and criticism. (Compl. ¶¶ 18-19.) When Professor Williams refused to comply with the order, the Defendants administratively changed Johnson's grade to a "B" on December 16, 2019 which was widely criticized by the faculty, parents, and the media. (Compl. ¶¶ 19-20.) Within a week, the Defendants terminated Professor Williams' employment based on, upon information and belief, her refusal to comply with the order. (Compl. ¶¶ 21.)

ARGUMENT

The First Amendment protects against abridgment of the freedom of speech. U.S. Const. amend. I. Professor Williams seeks relief for her termination because (a) her grading is a form of speech protected by the First Amendment and (b) the retaliatory termination of her employment by the Defendants abridged that freedom. 42 U.S.C. § 1983. The Defendants move to dismiss the

Complaint under Fed. R. Civ. P. 12(b)(6) on the grounds that Professor Williams' grading prerogative is not protected by the First Amendment, and they therefore have not violated the same. "The Rule 12(b)(6) standard requires the Court to 'assume the truth of the plaintiff's well-pleaded factual allegations and view them in the light most favorable to the plaintiff.'" *Boateng v. Metz,* 410 F. Supp. 3d 1180, 1187 (D. Colo. 2019) (quoting *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007)). Because granting a motion to dismiss is a harsh remedy, a complaint containing "enough facts to state a claim to relief that is plausible on its face" may proceed. *Id.* As to relevant precedents, the Tenth Circuit has yet to decide on the issue of whether grading is a speech protected under the First Amendment. The Supreme Court did not decide whether the *Garcetti* ruling in which public employee's speech pursuant to official duties is not entitled to protection "would apply in the same manner to a case involving speech related to scholarship or teaching." *Garcetti v. Ceballos,* 547 U.S. 410, 425 (2006).

Academic freedom is a "special concern of the First Amendment." *Keyishian v. Bd. Of Regents of Univ. of State of N.Y.,* 385 U.S. 589, 603 (1967). However, some courts have held that such special protections are given to universities, not to individual teachers. *See, e.g.*, *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419, 426 (1st Cir. 1986) ("The first amendment does not require that each nontenured professor be made a sovereign."). Notwithstanding such exclusivity of academic freedom, because the grading of individual teachers is a symbolic form of speech to their students, "if the speech of a nontenured professor is compelled by a university administrator, then the professor is not without redress for this violation of her constitutional rights." *Parate v. Isibor*, 868 F.2d 821, 827-29 (6th Cir. 1989). Because (a) the First Amendment protection of academic freedom should extend to individual professors and (b) even if it does not, grading is a symbolic form of speech that cannot be compelled, Professor Williams is entitled to seek relief under 42 U.S.C. § 1983.

I. Academic Freedom is a Special Concern of the First Amendment.

The courts have recognized the importance of academic freedom for its vital role in the future of the nation. *See Sweezy v. State of N.H.*, 354 U.S. 234, 250 (1957) (plurality opinion) ("The essentiality of freedom in the community of American universities is almost self-evident."); *see also Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014). The Supreme Court held that freedom as "a special concern of the First Amendment." *Keyishian*, 385 U.S. at 603. Our nation has the interest in preserving democracy and meritocratic academic atmosphere in which students are encouraged to learn and inquire without fear of favoritism or reprisal from the university administration. *See Sweezy*, 354 U.S. at 250 ("Teachers and students must always remain free to inquire, to study and to evaluate . . . otherwise our civilization will stagnate.") Withholding the "four essential freedoms" of universities from individual teachers runs contrary to this national interest. Therefore, the same level of protection for academic freedom should extend to individual teachers in evaluating their students.

A. <u>Restricting Academic Freedom of Individual Teachers Imperils the Nation.</u>

There is a special judicial concern of the First Amendment of safeguarding academic freedom. *Keyishian*, 385 U.S. at 603. The Supreme Court ruled that public employees are not entitled to the First Amendment protection when speaking within the scope of their official duties but reserved the application of that rule to "speech related to scholarship or teaching." *Garcetti*, 547 U.S. at 425. Notwithstanding *Garcetti*, the Ninth Circuit held that professors employed by a public university is afforded such protection acting pursuant to their official duties as teachers in evaluating the performance of their students. *Demers*, 746 F.3d at 411.

While the fundamental interest of universities is in the institutional management, the core interest of academic freedom is pursued by individual teachers in the classrooms. *See Parate*, 868 F.2d at 826 ("Academic freedom thrives [on the] robust and uninhibited exchange of ideas between the individual professor and his students.").

Restricting the academic freedom of individual teachers imperils the future of our nation. The purpose of the First Amendment protection of academic freedom is so that universities can pursue their academic ends without governmental interference. However, the universities as institutions do not conduct research and teach the students. Because individual teachers do, withholding the protection of academic freedom from them undermines the special concern of the First Amendment vital to the future of our nation. Assigning proper grades to students "requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking." *Id.* at 828 (citing *Bd. of Curators of the Univ. of Mo. V. Horowitz*, 435 U.S. 78, 98 (1978)). Individual teachers have the expertise and cumulative information in evaluating student performance. Therefore, restricting their academic freedom in grading is the very strait jacket upon the intellectual leaders that would imperil the future of our nation. *Sweezy*, 354 U.S. at 250

B. <u>"Four Essential Freedoms" Should Extend to Individual Teachers.</u>

Academic freedom should be extended to individual teachers in order to preserve the integrity of the schools. Universities are in "an atmosphere in which there prevail the 'four essential freedoms' . . . to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 263. In pursuit of such ends, the freedom of universities from government interference and the freedom of individual teachers from institutional interference are in conflict. *Parate*, 868 F.2d at 261. There also is a vital governmental concern to preserve the integrity of the schools. *Keyishian*, 385 U.S. at 624 (Clark, J., dissenting). In deciding whether to extend the "four essential freedoms" to individual teachers, the courts should balance the two conflicting interests in light of the national interest in research and teaching being conducted with integrity.

The purpose of the special concern of the First Amendment in the academic freedom is for the universities to provide an academic "atmosphere which is most conducive to speculation, experiment, and creation." *Sweezy*, 354 U.S. at 262. However, when the First Amendment protection of academic freedom is exclusive to universities, they may abuse the "four essential freedoms" on non-academic interests. Institutional abuse in deciding who may teach, what may be taught, how it shall be taught, and who may be admitted to study undermines the integrity of the schools to uphold democratic and meritocratic academic atmosphere in which research and teaching may thrive. At a minimum, the academic freedom of "how it shall be taught" should be shared with individual teachers as a proper check against academic discrimination and favoritism. Therefore, Defendants' argument that "the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught," *Brown v. Armenti*, 247 F.3d 69, 75 (3d Cir. 2001), betray the special concern of protecting essential academic freedoms of universities under the First Amendment. As such, the Defendants fundamentally fail establish that the academic freedom is exclusively "in the university, not in individual professors." *Urofsky v. Gilmore*, 216 F.3d 401, 410 (4th Cir. 2000) (en banc); *see also*, *Brown*, 247 F.3d at 74 (holding that the professor is the university's proxy in the classroom) (quoting *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998)).

II. Grading Prerogative of Individual Teachers Is Protected by the First Amendment.

Even if the constitutional protection of the "four essential freedoms" is exclusively institutional, the grading prerogative of individual teachers is considered a form of speech "entitled to some measure of First Amendment protection." *Parate*, 868 F.2d at 827. The justification for compelling a speech from a professor should be weighed against the harm from governmental intrusion into the intellectual life of a university. *Sweezy*, 354 U.S. at 256 (Whittaker, J., concurring). "Thus, the individual professor may not be compelled, by university officials, to change a grade that the professor previously assigned to her student." *Parate*, 868 F.2d at 828. Therefore, any university's attempt to compel individual teachers to assign specific grades to students is an abridgment of the freedom of speech protected by the First Amendment regardless of whether individual teachers enjoy that special protection of academic freedom.

A professor's grading prerogative is "a symbolic communication intended to send a specific message to the student." *Id.* at 827. A grade is a representation of a teacher's evaluation of how well a particular student performed in his or her classroom. While it is reasonable for a school to decide for itself what a class teaches pursuant to its freedom to determine what may be taught and how it shall be taught, it cannot compel a teacher to send a "specific message" to a student. Unilaterally changing a grade may be within the university's freedom to set a standard of instruction, but to rely on a threat of reprisal to the teacher to change the grade is both to compel a certain speech and to silence a speech already made by the teacher. Under the First Amendment, "the difference between compelled speech and compelled silence is without constitutional significance." *Id.* at 828. Therefore, the Defendant's arguments that "the university was the speaker and the professor was the agent of the university for First Amendment purposes" in the classroom and "the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught," *Brown*, 247 F.3d at 74, have no power here. While the Defendants could have administratively changed the grade, this case is distinguished from *Brown* because they ordered Professor Williams the grade change to hide the reason for the change fearing bad publicity and criticism. (*See* Compl. ¶ 19.) Since the Defendants abused their academic freedom deviating from the goal of providing an atmosphere conducive to research and learning, *Sweezy*, 354 U.S. at 263; *see also Parate*, 868 F.2d at 830 (distinguishing *Lovelace* where a professor failed to adhere to the university's grading policy), the argument that their ordering of Professor Williams to change a student's grade is an exercise of their academic freedom to determine what may be taught and how it shall be taught should be rejected.

CONCLUSION

For the foregoing reasons, Professor Williams respectfully requests the Court to deny the Defendant's motion to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6). There is a constitutional protection for academic freedom because it is a special concern of the First Amendment and the "four essential freedoms" of universities is vital to the future of our nation. Even if such academic freedom belong exclusively to universities, restricting that of individual teachers and failing to preserve the integrity of the schools would undermine its original purpose. Because grading is a form of symbolic communication between a teacher and a student, the Defendants compelling Professor Williams to change her student's grade and retaliating against her for refusing to do so is a violation of the First Amendment upon which equitable and monetary relief can be brought pursuant to 42 U.S.C. § 1983. Therefore, the Defendants failed to meet the standard of Rule 12(b)(6) to dismiss the Complaint.

Applicant Details

First Name	**Rachel**
Last Name	**Lefkowitz**
Citizenship Status	**U. S. Citizen**
Email Address	**rel7833@nyu.edu**
Address	**Address** Street **8200 Langbrook Road** City **Springfield** State/Territory **Virginia** Zip **22152** Country **United States**
Contact Phone Number	**5713276863**

Applicant Education

BA/BS From	**University of Virginia**
Date of BA/BS	**May 2021**
JD/LLB From	**New York University School of Law** **https://www.law.nyu.edu**
Date of JD/LLB	**May 24, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Review of Law and Social Change**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hertz, Randy
hertz@nyu.edu
212-998-6434
Liebert, Rachael
rbl258@nyu.edu
617-721-8008
Yoshino, Kenji
kenji.yoshino@nyu.edu
212-998-6421

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Rachel Lefkowitz
110 West 3rd Street
New York, NY, 22012

June 12, 2023

The Honorable Juan R. Sanchez
United States District Court
Eastern District of Pennsylvania
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Chief Judge Sanchez:

I am a rising third-year student at New York University School of Law, and I write to apply for a clerkship in the judge's chambers for the 2024-25 term.

One of my greatest strengths is persevering despite facing extreme adversity. I have a permanent physical disability that requires full-time use of a powered wheelchair and causes severe muscle weakness. Yet I am able to prevail with accommodations and by communicating with others about my needs. As chair of the Disability Allied Law Students Association, I advocate for students in the law school who have disabilities or require accommodations. In addition, as the Community Education and Accessibility Coordinator of the Review of Law and Social Change, I work with students to come up with creative solutions for their accessibility needs so that they can fully contribute to the journal. My unique personal experience of having a disability has given me a valuable perspective that I can bring to my work as a clerk.

I am enclosing my resume, a writing sample prepared for my Criminal Procedure Simulation class, law school transcript, and three letters of recommendation from NYU Law Professors Hertz, Yoshino, and Liebert. Vice Dean Randy Hertz taught my Criminal Law and Criminal Procedure Simulation class. Professor Kenji Yoshino taught my Leadership, Diversity and Inclusion Simulation course. Professor Rachael Liebert taught my lawyering class during my 1L year, and she is now the Program Manager at Sixth Amendment Center. Below please find their contact information:

Vice Dean Randy Hertz: 212-998-6434 and randy.hertz@nyu.edu
Professor Kenji Yoshino: 212-998-6421 and YoshinoK@mercury.law.nyu.edu
Professor Rachael Liebert: 617-721-8008 and rachael.liebert@6ac.org

I hope to have the opportunity to speak with you and can be reached by phone at 571-327-6863 or email at rel7833@nyu.edu. Thank you for your consideration.

Respectfully,
/s/ Rachel Lefkowitz
Rachel Lefkowitz

RACHEL E. LEFKOWITZ

110 West 3rd Street, New York, NY 10012
(571) 327-6863 rel7833@nyu.edu

EDUCATION

NEW YORK UNIVERSITY SCHOOL OF LAW, New York, NY
Candidate for J.D., May 2024

Honors:	*Review of Law & Social Change*, Community Education and Accessibility Coordinator
Activities:	Disability Allied Law Students Association, Chair
	Domestic Violence Advocacy Project, Student Volunteer
	Law Women & Women of Color Collective, Member
	Meltzer Center for Diversity, Inclusion, and Belonging, Student Fellowship, Fall 2023
	South Asian Law Students Association, Member
	Teaching Assistant for Lawyering, 2022-23

UNIVERSITY OF VIRGINIA, Charlottesville, VA
B.A. Double major in English and Women, Gender & Sexuality, *with distinction* (GPA 3.91), May 2021

Honors:	Phi Beta Kappa Honors Society, Member
	Commonwealth Award from Sociology Undergraduate Program, May 2020
Activities:	Cavalier Daily Newspaper, Writer

EXPERIENCE

KELLEY DRYE & WARREN LLP, New York, NY
Summer Associate, Summer 2023

UNITED STATES ATTORNEY'S OFFICE, E.D.N.Y., Brooklyn, NY
Legal Extern, Fall 2022
Drafted prosecution memoranda for matters involving child pornography, smuggling goods, and Hobbs Act robbery. Prepared historical cellsite data warrant, superseding indictment, and grand jury script for a directed exam. Participated in all aspects of a witness retaliation trial, including investigating defendant's jail calls, and researching substantive and procedural issues.

MERCER COUNTY PROSECUTOR'S OFFICE, Trenton, NJ
Summer Intern, June 2022-July 2022
Conducted research regarding a post-conviction relief petition. Compiled research into cohesive legal brief in opposition to Defense Counsel's brief. Investigated facts of cases and drafted indictments listing. Composed reference guide of cases involving instances where 404(b) evidence was permitted for sexual offenses and gang affiliation.

SEXUAL ASSAULT RESOURCE AGENCY, Charlottesville, VA
Hotline Volunteer, March 2020-October 2022
Provide crisis intervention by offering caring, reliable, empathetic advice. Serve as an immediate response to survivors of sexual assault at the time the support was needed. Direct survivors to resources and possible next steps.

WORKER'S RIGHTS CLINIC, Washington, DC
Intake Volunteer, July-September 2020
Interviewed workers over the phone about their employment related issues at work. Gathered relevant background information and then entered information into legal database. Reviewed information with experienced employment attorney and discussed legal advice and brief services assistance. Conveyed advice from attorney back to worker about possible next steps.

ADDITIONAL INFORMATION

Additional experience managing and supervising 20-30 employees who served as my personal care attendants (August 2017-March 2020). English tutor to 11–12-year-old students (March-May 2020).

Name:	**Rachel E Lefkowitz**
Print Date:	**05/31/2023**
Student ID:	**N13259967**
Institution ID:	**002785**
Page:	**1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Rachael B Liebert			
Criminal Law	LAW-LW 11147	4.0	B+
Instructor: Randy Hertz			
Procedure	LAW-LW 11650	5.0	A
Instructor: Arthur R Miller			
Contracts	LAW-LW 11672	4.0	B+
Instructor: Kevin E Davis			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Claudia Angelos, Jason D Williamson			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	B+
Instructor: Melissa E Murray			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Rachael B Liebert			
Legislation and the Regulatory State	LAW-LW 10925	4.0	B
Instructor: Adam M Samaha			
Torts	LAW-LW 11275	4.0	B+
Instructor: Catherine M Sharkey			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Claudia Angelos, Jason D Williamson			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Prosecution Externship - Eastern District	LAW-LW 10103	3.0	CR
Instructor: Alixandra Smith, Erin Reid			
Prosecution Externship - Eastern District Seminar	LAW-LW 10355	2.0	A-
Instructor: Alixandra Smith, Erin Reid			
Professional Responsibility and the Regulation of Lawyers	LAW-LW 11479	2.0	A
Instructor: Geoffrey P Miller			
European Human Rights Law	LAW-LW 11601	2.0	A
Instructor: Helene Tigroudja			
Property	LAW-LW 11783	4.0	B+
Instructor: Cynthia L Estlund			
Leadership, Diversity, and Inclusion Seminar	LAW-LW 12449	2.0	A-
Instructor: Kenji Yoshino, Gabriel Y Delabra			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	45.0	45.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Criminal Procedure: Post-Conviction Simulation	LAW-LW 10675	4.0	A-
Instructor: Randy Hertz			
Examining Disability Rights and Centering Disability Justice	LAW-LW 10983	2.0	A-
Instructor: Prianka Nair			
Evidence	LAW-LW 11607	4.0	A
Instructor: Daniel J Capra			
Teaching Assistant	LAW-LW 11608	2.0	CR
Instructor: Eric O Bravin			
Leadership, Diversity, and Inclusion Seminar	LAW-LW 12449	2.0	A-
Instructor: Kenji Yoshino, Gabriel Y Delabra			

	AHRS	EHRS
Current	14.0	14.0
Cumulative	59.0	59.0

Staff Editor - Review of Law & Social Change 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

May 25, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

Dear Judge Sanchez:

I am writing to recommend Rachel Lefkowitz for a clerkship.

In her first semester of law school, Rachel was in my 1L Criminal Law course. The grade she received in the course, which was a B+, was based entirely on the exam. If the grade factored in class participation, it would have been much higher. Rachel participated actively in class and came regularly to office hours sessions. Her comments in both settings were highly thoughtful.

In the spring semester of her second year, Rachel was in my “Criminal Procedure: Arraignment to Postconviction” course. The course is mostly taught in seminar-style form but there are also in-class simulation exercises that give students the opportunity to use the legal doctrines and procedural rules they’re studying and to do so in role. The written work for the course consists of two papers: a memorandum of points and authorities in a simulated federal criminal case, using Federal Rule of Evidence 609(a) and federal court caselaw to argue (as prosecution or defense) whether a defendant’s prior conviction is available for use in prosecutorial cross-examination of the defendant if he chooses to take the witness stand at trial; and a simulated internal memo to the head of a capital defender office, analyzing what claims can be brought in state postconviction and federal habeas corpus and how to overcome the procedural bars stemming from the prior defense lawyers’ failures to preserve the issues at trial and on direct appeal.

Rachel did an excellent job in all aspects of the course, and she received a grade of A-. In the seminar-style discussions of legal doctrines and key cases, she participated actively in class and made insightful comments. In the in-class simulation exercises, she demonstrated great creativity and excellent judgment. In the written memos, she did first-rate research and used the authorities to analyze the legal, factual, and strategic issues in a comprehensive and cogent manner. She made excellent choices about which of the potentially available arguments to make and which to forego; framed her arguments in the most persuasive way; and dealt carefully and appropriately with the counter-arguments likely to be raised by the other side.

I believe that the qualities I have observed in Rachel – her intelligence; first-rate skills of researching and writing; thoughtfulness; and good judgment – would enable her to do an excellent job as a law clerk.

Sincerely,

Randy Hertz

Randy Hertz - hertz@nyu.edu - 212-998-6434

SIXTH
AMENDMENT
CENTER
P.O. Box 15556, Boston MA 02215

Rachael Liebert
Program Manager
rbl258@nyu.edu
617-721-8008

May 23, 2023

RE: Rachel Lefkowitz, NYU Law '24

Your Honor:

Rachel Lefkowitz is an exceptional law student and will be an outstanding judicial clerk. As Rachel's professor in the first-year Lawyering Program at NYU School of Law, I had an opportunity to observe Rachel both in class and in a variety of simulations that expose students to diverse professional and interpersonal skills. Rachel is an inquisitive and self-motivated student who possess excellent critical thinking and research and writing skills, and who loves to learn for learning's sake. I write to recommend her for a clerkship in the strongest possible terms.

The Lawyering Program, a key part of the first-year JD curriculum at NYU, is a small, year-long, simulation-based course. In this course, students operate within small teams, critique each other's work, and receive detailed feedback on a range of skills, including conducting legal research and factual due diligence, drafting objective memoranda and persuasive briefs, interviewing and counseling clients, and oral advocacy.

Rachel's performance in my class was exemplary. Rachel's written work, including both her predictive memos and her persuasive briefs, reflected comprehensive research and an impressive ability to navigate subtle legal distinctions and details. Rachel entered law school as a strong writer, and quickly took to the specifics of legal analysis and writing, incorporating strong reasoning by analogy, using declarative language, and grounding her argumentation in case law. Rachel often came to office hours to discuss different approaches to structuring legal arguments, and, not satisfied with anything but the best, she routinely experimented with various structures until she found the perfect framework for a given argument.

Rachel also contributed significantly to classroom discussions and simulations. As a person with a physical disability, Rachel added a unique perspective to conversations about the power of the law, and she was particularly attuned to how the law impacts individuals' lived experiences. Rachel also regularly surfaced important issues related to the role of lawyers in broader contextual dynamics, and she created a welcoming environment in which other students felt comfortable sharing their own perspectives. In our client-based simulations, Rachel demonstrated a strong ability to build rapport and empower her clients. For example, in a simulated interview with a client who faced workplace discrimination, Rachel was able to learn more information than other students because of the bond that she formed with the client. Given Rachel's outstanding contributions to class and simulations, I selected Rachel to be a Teaching Assistant for the Lawyering Program during her second year of law school, and I know that the Lawyering Program has benefited greatly from her involvement.

On a more personal note, Rachel is a pleasure to work with and will make an excellent colleague. Rachel has always taken advantage of opportunities to meet with me one-on-one for mentorship and career advice, and I have delighted in watching her gain confidence as an aspiring lawyer and find new ways to advocate for others. Rachel is thoughtful, mature, and conscientious, and I am confident that she will thrive in the intimate setting of a judge's chambers.

If selected for a judicial clerkship, Rachel will provide excellent service to the Court, take full advantage of the learning opportunities afforded to clerks, and use her position to help elevate others whose backgrounds are, like hers, less commonly reflected in the legal profession. I recommend Rachel for a clerkship in the strongest possible terms. If I can be of any further assistance in your deliberations, please do not hesitate to contact me at rbl258@nyu.edu or 617-721-8008.

Sincerely,

Rachael Liebert

Rachael Liebert

NYU | LAW

KENJI YOSHINO
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May 30, 2023

The Honorable Juan Sanchez
James A. Byrne United States Courthouse
601 Market Street, Room 14613
Philadelphia, PA 19106-1729

RE: Rachel Lefkowitz, NYU Law '24

Dear Judge Sanchez:

It's a particular pleasure to recommend Rachel Lefkowitz, a member of NYU School of Law's Class of 2024, for a clerkship in your chambers. I taught Rachel in a year-long seminar titled "Leadership, Diversity, and Inclusion" (LDI) in 2022-23. I therefore feel I know Rachel extremely well and feel confident giving her my highest recommendation.

The LDI class has an enrollment limited to eighteen students each year. It seeks to "boot camp" the class not only on the substance of diversity and inclusion, but also on practical skills such as writing and oral presentations. My co-instructor and I work extremely closely with each of the students.

Rachel distinguished herself in each aspect of this intense class. Her oral presentations were polished and well-researched. Her class participation was pithy and on point. She was a terrific interlocutor for her classmates, often building upon or synthesizing their comments to advance the discussion.

Rachel's most impressive contribution in the course, however, was her written work. She wrote her paper for our course on the amplification of rhetoric in the diversity and inclusion field. She was largely responding to Robin DiAngelo's book White Fragility, which we had read as a class. Students have written on this book in past iterations of the course. Rachel's approach was notably different from those of her predecessors.

First, Rachel was able to paint the book in the best possible light, making the work "the best it could be" before turning to critique it. In general, Rachel is excellent at not demonizing her intellectual or ideological opponents. Second, she was able to draw fresh and cogent analogies to the law, showing how some of the debates that DiAngelo identified popular discourse were also being fought out in the case law surrounding civil-rights statutes. Finally, the paper was extremely well written. Perhaps in part due to her undergraduate training as an English major, Rachel has an enviably smooth and readable style.

Any recommendation of Rachel that did not address her personal qualities would be incomplete. Rachel is a cheerful, determined, and passionate person. Because she has a motor disability, she uses a wheelchair and cannot raise her hand in class. I admired her matter-of-fact approach to her disability. She observed to the class in an early session that she could not raise her hand to speak and wanted to clarify that she would be breaking in from time to time. She noted that she was sharing this so that she would not appear to be rude. Where issues of disability came up in the class, she was a quiet and forceful advocate. Indeed, we ended up changing the syllabus for the course to include a book on disability rights due to comments she made in the course. I now consider this to be a permanent change in the syllabus.

I know Rachel will go far in the law. She had a challenging time interviewing with firms this fall. While she ultimately landed a position, she had many adverse experiences on the market. I admired her unflappable determination, which I know will serve her well in a clerkship and beyond. I think she will be a transformative role model in the disability space, whether she decides to make her substantive contribution there or not.

If I were you, I would not hesitate!

Sincerely,

Kenji Yoshino

Kenji Yoshino - kenji.yoshino@nyu.edu - 212-998-6421

WRITING SAMPLE OF RACHEL LEFKOWITZ
NEW YORK UNIVERSITY SCHOOL OF LAW
J.D. CLASS OF 2024

[My writing sample is a memorandum of points and authorities in support of the defendant's motion *in limine* to exclude the prior conviction of willfully injuring government property. This writing sample is entirely my own work, without edits from anyone else, therefore, this draft was completed before I received any oral or written feedback from anyone.]

U.S. v. Davis
Memorandum of Points and
Authorities in Support of the
Defendant's Motion *In Limine* to
Exclude the Prior Conviction
Criminal Procedure Assignment

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF
PENNSYLVANIA

-- X	MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE THE PRIOR CONVICTION
UNITED STATES OF AMERICA]	
v.]	
DANIEL DAVIS,]	
Defendant]	No. 18,493 CRIM.
-- X	

ARGUMENT

I. The court should declare defendant's prior conviction inadmissible as impeachment evidence under Rule 609(a)(1), in the event he chooses to testify at trial.

The crime that Mr. Davis was convicted of is willfully injuring government property in violation of Section 1361 of Title 18, United States Code, by breaking the latches of the doors of postal boxes set into the exterior wall of the US post office. Prior Conviction Indictment ¶¶ 1-6. The amount of damage to the said doors exceeded the sum of $1000 such that the offense was punishable by a maximum sentence of 10 years in prison. *Id*. Pursuant to the Federal Rules of Evidence, the credibility of a witness may be impeached by evidence of prior convictions if the prior conviction was for a felony. Fed. R. Evid. 609(a)(1). Here, the prior offense was punishable by more than one year of imprisonment, thus the conviction satisfies 609(a)(1). However, when the testifying witness is the defendant, the prior conviction must be admitted in a criminal trial only "if the probative value of the evidence outweighs its prejudicial effect to that defendant." Fed. R. Evid. 609(a)(1). The Third Circuit has outlined four factors to determine whether the probative value of a past conviction outweighs its prejudicial effect under Rule 609(a)(1): "(1) the kind of crime involved; (2) when the conviction occurred; (3) the importance of the witness's testimony to the case; [and] (4) the importance of the credibility of the defendant." *Gov't of V.I. v. Bedford*, 671

F.2d 758, 761 (3d Cir. 1982). The Third Circuit has held that Rule 609(a)(1) "reflects a heightened balancing test" with a "predisposition toward exclusion" and that "[a]n exception [to exclusion of the evidence] is made only where the prosecution shows that the evidence makes a tangible contribution to the evaluation of credibility and that the usual high risk of unfair prejudice is not present." *United States v. Jessamy*, 464 F. Supp. 3d 671, 675 (M.D. Pa. 2020). In the instant case, the four Bedford factors taken together weigh against admitting the prior conviction as the probative value of the evidence does not outweigh its prejudicial effect to the defendant. Therefore, the *in limine* motion to preclude the prosecution from using the defendant's prior conviction to impeach him under Rule 609(a)(1) in the event he chooses to testify at trial should be granted.

A. The first Bedford factor weighs in favor of excluding the prior conviction.

When considering the first Bedford factor regarding the kind of crime involved, "courts consider both the impeachment value of the prior conviction as well as its similarity to the charged crime." *United States v. Caldwell*, 760 F.3d 267, 286 (3d Cir. 2014). "The impeachment value relates to how probative the prior conviction is to the witness's character for truthfulness." *Id.* "When considering this factor, 'the court asks whether the past conviction involved dishonesty, false statements, or any other offense in the nature of *crimen falsi*.'" *United States v. Guerrier*, 511 F. Supp. 3d 556, 562 (M.D. Pa. 2021) (citing *Walker v. Horn*, 385 F.3d 321, 334 (3rd Cir. 2004)). The phrase "dishonesty and false statement" refers to crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully. *Cree v. Hatcher*, 969 F.2d 34, 37 (3d Cir. 1992). Crimes such as robbery, larceny, and theft have been found to reflect dishonesty on the part of the witness and are thus considered to be more probative of truthfulness. *United States v. Smith*, 2006 U.S. Dist. LEXIS 9692, at *2 (E.D. Pa. Mar. 13, 2006); *see United States v. Fromal*, 733 F. Supp. 960, 973

(E.D. Pa. 1990) ("The crime of larceny has been held in this district to involve dishonesty, as has robbery."); *Caldwell*, 760 F.3d at 286 ("[C]rimes that by their nature imply some dishonesty, such as theft, have greater impeachment value and are significantly more likely to be admissible.").

With respect to the similarity of the crime to the offense charged, the “balance tilts further toward exclusion as the offered impeachment evidence becomes more similar to the crime for which the defendant is being tried." *Caldwell*, 760 F.3d at 286. There is a heightened risk of prejudice if the witness is the defendant and the crime committed in the past is similar to the crime now charged, “‘since this increases the risk that the jury will draw an impermissible inference’ that the defendant committed the present offense because he or she committed the prior offense.” *United States v. Dubose*, 2022 U.S. Dist. LEXIS 203026, at *20 (E.D. Pa. Nov. 8, 2022) (quoting *Caldwell*, 760 F.3d at 286).

The crime that Daniel Davis (“Mr. Davis") was convicted of is willfully injuring government property by breaking the latches of the doors of postal boxes set into the exterior wall of the US post office. Prior Conviction Indictment ¶¶ 1-4. The crime of willfully injuring government property does not by its nature imply some dishonesty, so the crime has less impeachment value, and it is less probative of truthfulness. *Caldwell*, 760 F.3d at 286. In the instant case, Mr. Davis has been charged with unlawfully taking a Social Security check from a letter box, mail receptacle, or authorized depository for mail matter, possessing the stolen check, forging the stolen check, and passing the stolen check. Pending Indictment ¶ 1-4. Additionally, in the fact pattern of the instant case, the door of the mailbox, where the check was stolen from, had been pried open and the latch was broken, which maps onto Mr. Davis’s prior conviction quite closely. Davis Aff. ¶ 5. The crime of willfully injuring government property by breaking the doors of postal boxes is almost identical to the fact pattern of the current case and the prior conviction is so similar to the offenses charged against Mr. Davis that it requires exclusion. *Caldwell*, 760 F.3d at 286. Both the prior conviction and the alleged offenses are related to postal boxes such that this similarity “increases the risk that the jury will draw an impermissible inference” that Mr. Davis committed the present offense because he committed the prior offense. *Id*. Therefore, the kind of crime involved in the prior conviction weighs in favor of excluding the conviction as there is less probative value since the crime did not have an element of deceitfulness, and the similarity of the crime to the current offenses are so similar that it will be unduly prejudicial to the defendant if the prior conviction is admitted.

B. The second Bedford factor weighs in favor of excluding the prior conviction.

The second Bedford factor refers to the age of the conviction. Older convictions tend to have a greater prejudicial effect because they have less probative value. *Dubose*, 2022 U.S. Dist. LEXIS 203026, at *20-21; *see United States v. Paige*, 464 F. Supp. 99, 100 (E.D. Pa. 1978) (holding that a longer length of time between a conviction and trial lessened its probative value). If less than ten-years have passed since the witness's conviction or release from confinement, the conviction is generally admitted because the more recent a conviction is, the more likely it affects a defendant’s credibility. *United States v. Murphy*, 172 F. App'x 461, 464 (3d Cir. 2006) (holding that when only three and four years have passed since the conviction, this weighs in favor of admitting the crime); *Diaz v. Aberts*, No. 10-5939, 2013 U.S. Dist. LEXIS 74373, at *26 (E.D. Pa. May 28, 2013) (finding that defendant’s prior convictions occurred within approximately the last four years, and that recency weighed in favor of admission). But even where the conviction is not subject to the ten-year restriction, "the passage of a shorter period can still reduce [a prior conviction's] probative value." *Caldwell*, 760 F.3d at 287. The age of a conviction may weigh particularly in favor of exclusion "where other circumstances combine with the passage of time to suggest a changed character." *Id*. “For example, a prior conviction may have less probative value where the defendant-witness has maintained a spotless record since the earlier conviction or where the prior conviction was a mere youthful indiscretion." *Id.*

Mr. Davis's prior conviction occurred six and a half years ago on December 31, 2016, so it is not subject to the ten-year restriction excluding the conviction. Prior Conviction Indictment ¶¶ 1-6. However, "other circumstances combine with the passage of time to suggest a change in character" because Mr. Davis "has maintained a spotless record since the earlier conviction" six and a half years ago and the conviction occurred when he was only twenty-three years old such that "the prior conviction was a mere youthful indiscretion." *Caldwell*, 760 F.3d at 287. After Mr. Davis completed his sentence of fifteen months of probationary supervision, he was discharged from it without further incident and this conviction was his only previous brush with the law. Sentencing Agreement ¶¶ 4-6. Thus, this factor weighs in favor of excluding the prior conviction because the conviction has less probative value compared to its highly prejudicial effect.

C. The third Bedford factor weighs in favor of excluding the prior conviction.

"The third factor inquires into the importance of the defendant's testimony to his defense at trial." *Caldwell*, 760 F.3d at 287. "A defendant's decision about whether to testify may be based in part on whether his prior convictions will be admitted for impeachment purposes." *Id*. Thus, the strategical need for the defendant to testify on his or her own behalf to demonstrate the validity of their defense may weigh against the admission of a prior conviction. *Id*. "If it is apparent to the trial court that the accused must testify to refute strong prosecution evidence, then the court should consider whether, by permitting conviction impeachment, the court in effect prevents the accused from testifying." *Id.*; *Jessamy*, 464 F. Supp. 3d at 676 (noting that defendant's testimony is important in refuting the government's strong evidence, including testimony of witnesses). If the defendant's testimony may be fundamentally important to his defense, then this counts in favor of excluding the prior conviction. *Guerrier*, 511 F. Supp. 3d at 565 (observing that when the